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N. 7809  
No. 13490

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**United States  
Court of Appeals**  
for the Ninth Circuit.

ROSCOE FOWLER,

Appellant,

vs.

VIMCAR SALES COMPANY, a Corporation,  
VICTOR M. CARTER and MORRIS J.  
HALOPOFF,

Appellees.

**Transcript of Record**  
In Two Volumes  
Volume I  
(Pages 1 to 352)

Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

MAR 28 1953





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,

Defendants.

COMPLAINT FOR INFRINGEMENT OF U. S.  
PATENT No. 2,516,196 AND FOR UNFAIR  
COMPETITION

Plaintiff Complains of Defendants, and for Cause  
of Action Alleges:

1.

This cause of action arises under the patent laws  
of the United States of America and this Court has  
jurisdiction thereof under 28 U.S.C. 1338(a).

2.

Plaintiff is a citizen of the State of California,  
and resides in Los Angeles County in the Southern  
Judicial District of California.

3.

The defendant, Vimcar Sales Company, is a cor-  
poration duly organized and existing under and by  
virtue of the laws of the State of [2\*] California,

---

\*Page numbering appearing at foot of page of original Certified  
Transcript of Record.

has a regular and established place of business and is doing business in Los Angeles County in the Southern Judicial District of California.

## 4.

The defendants Victor M. Carter and Morris J. Halopoff reside and have regular and established places of business in Los Angeles County, in the Southern Judicial District of California.

## 5.

On July 25, 1950, United States Letters Patent No. 2,516,196 were duly and legally issued to plaintiff for Adjustable Overhead Door Hinge and since that date plaintiff has been and still is the owner of said Letters Patent and of all rights to sue for past and present infringements thereof.

## 6.

The defendants and each of them have jointly and severally, wilfully and wantonly infringed and still are infringing said Letters Patent by making, using and selling, and causing to be made, used and sold, in the Southern Judicial District of California and elsewhere in the United States, Overhead Door Hardware including Adjustable Overhead Door Hinges embodying the inventions described and claimed in said patent and said defendants threaten to and will continue to infringe said patent unless enjoined by this Court. Plaintiff has suffered great and irreparable damage by said infringements and will continue to be damaged thereby unless the defendants are enjoined by this Court.

7.

The defendant Victor M. Carter is a director of the corporate defendant Vimcar Sales Company and is the president, manager and [3] principal stockholder of said corporation, and has personally instigated and directed the infringements committed by the defendant Vimcar Sales Company. The defendants, and each of them, have had personal knowledge of the infringements herein complained of and have wilfully and wantonly aided, abetted and conspired with each other to infringe said Letters Patent and to render the same valueless.

8.

The defendants have been notified in writing of their infringement of said patent aforesaid.

For a Second and Separate Cause of Action, Plaintiff Alleges:

9.

This cause of action is for unfair competition and this Court has jurisdiction thereof under 28 U.S.C. 1338(b), and 15 U.S.C. 1121, 1126(h) and (i).

10.

Plaintiff repleads and incorporates herein by reference paragraphs 2 to 8, inclusive, of his First Cause of Action.

11.

Plaintiff is engaged in the business of manufacturing and selling in commerce among the several states of the United States and which may lawfully be regulated by Congress, overhead garage door

hardware including adjustable overhead door hinges as disclosed and claimed in plaintiff's patent No. 2,516,196.

## 12.

The defendants Vimcar Sales Company and Victor M. Carter were formerly customers of plaintiff and purchased substantial quantities [4] of said overhead hardware from plaintiff, in the course of which dealings and at the specific instance and request of said defendants, plaintiff furnished to said defendants complete information as to said products and their manufacture and also various advertising materials including photos, cuts, drawings and printed literature which defendants used in merchandising said products purchased by them from plaintiff.

## 13.

During the time that defendants Vimcar Sales Company and Victor M. Carter were customers of plaintiff and thereafter, said defendants conspired with each other and with the defendant Morris J. Halopoff to unfairly compete with plaintiff by manufacturing and selling products which were substantial duplicates in all respects of said products manufactured by plaintiff under his said patent and to copy and appropriate plaintiff's said advertising materials, with the intent and for the purpose of confusing the buying public and causing purchasers and prospective purchasers to believe that defendants' goods were manufactured by plaintiff.



## 14.

Pursuant to said conspiracy, the defendants have wilfully and wantonly used in commerce that may be lawfully regulated by Congress and without the consent of plaintiff, reproductions, counterfeits, copies and colorable imitations of plaintiff's said products and advertising materials and have used the same in connection with the sale, offering for sale, and advertising of said products, which use is likely to cause confusion, mistake and deception of purchasers as to the source of origin of said goods, all of which acts constitute unfair trade practices and unfair competition with plaintiff. [5]

## 15.

That the acts of unfair competition above complained of have in fact caused confusion, mistake and deception of customers and others in the trade and enabled defendants to palm off their goods as those of plaintiff, and by reason of said unfair acts of defendants and said palming off, the defendants have made substantial profits and have been unjustly enriched thereby and plaintiff has been seriously damaged and will continue to be damaged unless defendants are restrained by this Court from continuing their said acts of unfair competition.

Wherefore, plaintiff prays for a preliminary and final injunction against further infringement of said patent, and against further acts of unfair competition by defendants, their officers, agents, employees, attorneys and those controlled by or associated or in active concert with them; for an

accounting for profits and damages for said infringements and acts of unfair competition; that the amount of said damages be trebled; for his costs and attorneys fees incurred in this action; and for such other and further relief as this Court shall deem just and proper.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBT. W. FULWIDER,  
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed April 5, 1951. [6]

---

[Title of District Court and Cause.]

### ANSWER

Defendants, Vimcar Sales Company, Victor M. Carter, and Morris J. Halopoff, for their answer to the Complaint of plaintiff, Roscoe Fowler, aver as follows:

1.

Defendants admit that this cause of action arises under the patent laws of the United States of America and that this court has jurisdiction thereof.

2.

Defendants are without knowledge and information sufficient to form a belief as to the truth of the allegation contained in paragraph 2 of the Complaint and therefore deny it.

3.

Defendant, Vimcar Sales Company, admits that it is a corporation duly organized and existing under and by virtue of [8] the laws of the State of California and that it has a regular and established place of business and is doing business in Los Angeles County in the Southern Judicial District of California.

4.

Defendants, Victor M. Carter and Morris J. Halopoff, admit that they reside in and have regular and established places of business in Los Angeles County.

5.

Defendants, and each of them, deny each and all of the allegations of paragraph 5 of the Complaint.

6.

Defendants, and each of them, deny each and all of the allegations in paragraph 6 of the Complaint.

7.

With respect to allegation No. 7 of the Complaint, Defendant, Victor M. Carter, admits that he is a director of the corporate defendant, Vimcar Sales Company, and that he is the president, manager and principal stockholder of said corporation. With respect to all of the remaining allegations of paragraph 7 of the Complaint, Defendants, and each of them, deny them.

## 8.

Defendants, Vimcar Sales Company, and Victor M. Carter, admit receiving notice in writing of infringement of the patent in suit. Defendant, Morris J. Halopoff, denies receiving notice of any kind of infringement of the patent in suit.

## 9.

Defendants admit general jurisdiction of this court over unfair competition matters when related to patent infringement but deny that there is here a cause of action for unfair competition. [9]

## 10.

With respect to allegation 10 of the second and separate cause of action, Defendants incorporate in this allegation the same answers heretofore made to allegations of paragraphs 2 to 8, inclusive, of the first cause of action.

## 11.

Defendants are without knowledge or information sufficient to form a belief as to the truth of allegations contained in paragraph 11 of the Complaint and therefore deny them.

## 12.

With respect to paragraph 12, Defendants, Vimcar Sales Company and Victor M. Carter, admit that they were formerly customers of the Plaintiff and that they purchased quantities of overhead door hardware from the Plaintiff, but as to each and all of the remaining allegations of paragraph 12, Defendants deny them.

13.

Defendants, and each of them, deny each and all of the allegations of paragraph 13 of the Complaint.

14.

Defendants, and each of them, deny each and all of the allegations of Paragraph 14 of the Complaint.

15.

Defendants, and each of them, deny each and all of the allegations of paragraph 15 of the Complaint.

As a Further and Affirmative Defense to Said Complaint Defendants Aver:

16.

That on information and belief U. S. Patent No. 2,516,196 is invalid and void for the reason that the alleged invention thereof attempted to be patented therein, and every material and substantial part thereof had long prior to the alleged invention or [10] discovery thereof by Roscoe Fowler or more than one year prior to the filing of the application for said patent in suit, been patented, described and contained in patents numbered and dated as follows:

|                    |           |
|--------------------|-----------|
| Soucek, et al..... | 951,344   |
| Wentworth .....    | 1,177,749 |
| Mize .....         | 1,942,720 |
| Guth .....         | 2,162,381 |
| Ferris .....       | 2,164,648 |
| Wolf .....         | 2,166,898 |

|                   |           |
|-------------------|-----------|
| Ferris .....      | 2,170,295 |
| Holmes .....      | 2,228,314 |
| Peck .....        | 2,233,638 |
| Holmes .....      | 2,259,819 |
| D'Autremont ..... | 2,347,770 |
| Wread .....       | 2,441,742 |

## 17.

That on information and belief said Roscoe Fowler was not the original, first and true inventor of the alleged inventions purported to be covered by said patent in suit No. 2,516,196, or of any material or substantial part thereof but that the same were disclosed prior to the alleged invention thereof or more than one year prior to the filing by said Roscoe Fowler of the application for said patent in suit in printed publications and among others in the specifications and drawings of said patents recited in [11] paragraph 16 hereof and also in printed publications and advertising literature of Sturdee Steel Products Company, presently located at 6820 Brynhurst Avenue, Los Angeles 43, California.

## 18.

That on information and belief Roscoe Fowler was not the original or first inventor or discoverer of any material or substantial part of the things included in said patent and that the same involved merely the exercise of mechanical skill and judgment in view of common knowledge and practice in the art long prior to Roscoe Fowler's alleged in-

ventions or more than one year prior to his application for said patent in suit.

## 19.

That on information and belief said patent in suit No. 2,516,196 is invalid and void for the reason that the alleged invention thereof and all of material and substantial parts thereof were invented by others, known to others, used by others or were in public use or on sale in the United States by persons or corporations, and employees and officers thereof prior to the alleged inventions by said Roscoe Fowler or more than one year prior to the filing of applications for said United States patent in suit No. 2,516,196, including, among others:

Tavart Company, Ltd., presently located at 15134 South Orizaba Avenue, Paramount, California;

Cliff Saint, Bakersfield Sand, Stone and Gravel Company, 315 East 18th Street, Bakersfield, California;

Roscoe Fowler, 6820 Brynhurst Avenue, Los Angeles 43, California. [12]

## 20.

That on information and belief in view of the knowledge and practice of the art at and long prior to the dates of filing of applications for said patent in suit No. 2,516,196, there was required no invention whatsoever but only the ordinary skill of the art to which said alleged invention appertains and that said patent is consequently invalid and void.

## 21.

That, on information and belief, said patent in suit No. 2,516,196 does not describe the alleged invention as required by law in such full, clear, and exact terms as to enable any persons skilled in the art or science to which they appertain to make, employ, or use the same and does not point out and distinctly claim the parts or improvements claimed as the patentee's alleged invention as required by law and is therefore invalid.

## 22.

That on information and belief the disclosure of said patent No. 2,516,196 is inaccurate, misdescriptive and erroneous and was written to intentionally confuse and deceive the Examiner and to secure the issue of a patent which is not truly portrayed in the description as required by law and the patent is therefore invalid.

## 23.

That Defendants have been diligent in ascertaining and setting forth herein instances of prior knowledge, invention, use, publication and patenting of the alleged invention of patent in suit No. 2,516,196 and believing many further instances to exist, Defendants pray leave to add the same by amendment or otherwise when ascertained. [13]

Wherefore Defendants Pray:

1. That the patent in suit be declared invalid.
2. That the patent in suit be declared not infringed.



3. That the Complaint be dismissed with respect to the Defendants with prejudice.

4. That the second cause of action directed to unfair competition be dismissed with respect to the Defendants with prejudice.

5. That the Defendants be awarded attorneys' fees.

6. That the Defendants be awarded damages, costs and such other and further relief as may in justice be required.

Dated: May 18, 1951.

[Seal]                   VIMCAR SALES COMPANY,

By /s/ VICTOR M. CARTER,  
                                  President.

/s/ VICTOR M. CARTER,

/s/ MORRIS J. HALOPOFF,

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 21, 1951. [14]

[Title of District Court and Cause.]

CIVIL SUBPOENA TO PRODUCE  
DOCUMENT OR OBJECT

To Roscoe Fowler:

You Are Hereby Commanded to appear at the office of Huebner, Beehler, Worrel & Herzig, at 610 South Broadway, Room 410, in the city of Los Angeles, on the 30th day of August, 1951, at 10:00 o'clock a.m. pursuant to notice heretofore served upon you requiring your attendance at a deposition to be taken on that day in connection with the above-entitled action and bring with you all books and records pertaining to the design, construction, manufacture and sale of overhead door hardware since said Roscoe Fowler has entered into the manufacture thereof, including especially blueprints and specifications relating to overhead door hardware identified currently as "jamb hardware" having a structure substantially similar to that illustrated in Fowler, et al., Patents Nos. 2,523,207 and 2,516,196 in products identified by plaintiff as De Luxe Jamb, Econo-Jamb, Lo-Head Jamb; and including standard "jamb hardware"; sales records and purchase records of said Roscoe Fowler, Rosecoe Fowler d.b.a. Sturdee Steel Products Co., and predecessor companies, relating to "jamb hardware"; copies of all advertising and other literature of said Fowler, Sturdee Steel Products Co., and predecessor companies, illustrating or describing all styles of overhead door "jamb hardware," and information as

to the identity of trade magazines, newspapers and other advertising media employed for the purpose of advertising.

Date August 24, 1951.

[Seal]                    EDMUND L. SMITH,  
                                 Clerk.

By /s/ [Indistinguishable],  
                                 Deputy Clerk.

Return on Service

Received this subpoena at 610 South Broadway, Los Angeles, on August 28, 1951, and on August 28, 1951, at 6820 Brynhurst Avenue, Los Angeles, served it on the within named Plaintiff, Roscoe Fowler, by delivering a copy to him and tendering to him the fee for one day's attendance allowed by law.

Dated: August 28, 1951.

/s/ HARLAN P. HUEBNER.

Subscribed and sworn to before me, a Notary Public, this 28th day of August, 1951.

[Seal]    /s/ MARGARET BARNEY,  
Notary Public in and for the County of Los Angeles, State of California.

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[Endorsed]: Filed October 15, 1951. [16]

[Title of District Court and Cause.]

## NOTICE UNDER R. S. 4920

Come now the Defendants herein and under Section 4920 of the Revised Statutes of the United States, 35 U. S. Code 69, give notice to the Plaintiff that, in support of their allegations of invalidity predicated upon prior use, prior invention, prior publication and want of invention heretofore pleaded in the Answer and based upon specific patents and instances of prior knowledge, prior use and prior publication, Defendants supplement the same by the following:

## Prior Patents

(In addition to those set forth in paragraph 16 of Defendants' Answer) namely:

|                        |           |
|------------------------|-----------|
| Englerth .....         | 934,149   |
| Claud-Mantle .....     | 2,185,214 |
| St. John, Jr. ....     | 2,213,230 |
| Gallagher, et al. .... | 2,255,769 |
| D'Alfonso .....        | 2,324,138 |
| Violante .....         | 2,425,905 |

## Patents Showing Generally the State of the Art

|                              |           |
|------------------------------|-----------|
| N. W. Smith.....             | 2,569,351 |
| Filed September 5, 1945      |           |
| Issued September 25, 1951    |           |
| N. W. Smith (Canadian) ..... | 465,423   |
| Issued May 23, 1950          |           |
| Fowler, et al. ....          | 2,523,207 |
| Filed January 14, 1946       |           |
| Issued September 19, 1950    |           |

Publications

Building Supply News, issue of February, 1946, page 3, advertisement of Tavart Co., Ltd.

Western States A-E-C Catalog File 1946-47, section 12, advertisements respectively of Coffey Overhead Doors, Inc., Tavart Co., Ltd., Sturdee distributed by W. H. Steele Co. [18]

Western States A-E-C Catalog File 1947-48, section 12, advertisements respectively of Coffey Overhead Doors, Inc., Tavart Co., Ltd., Sturdee distributed by W. H. Steele Co.

Prior Knowledge and Use

Coffey Overhead Doors, Inc.,

J. T. Coffey,

C. E. Young,

4829 W. Pico Blvd.,

Los Angeles, Calif.

Norman W. Smith,

Address not yet known.

Earl F. Murphy,

Address not yet known.

Newland Top Shop,

4761 E. Olympic,

Los Angeles 22, Calif.

Harry Swensen,

1223 Ferris Avenue,

Los Angeles, Calif.

Defendants further state that the instances of prior knowledge and use by Coffey Overhead Doors, Inc., J. T. Coffey, C. E. Young, Norman W. Smith, and Earl F. Murphy, and all of the instances of

prior publication set forth in this notice were well known to the Plaintiff herein long prior to the commencement of this action but were not discovered by the Defendants or known to the Defendants with the certainty required by this notice [19] until within five days prior to the date of service upon Plaintiff.

Dated: October 23, 1951.

HUEBNER, BEEHLER,  
WORREL & HERZIG.

By /s/ VERNON D. BEEHLER,  
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1951. [20]

---

[Title of District Court and Cause.]

SUPPLEMENTAL NOTICE UNDER  
R. S. 4920

Come now the Defendants herein and under section 4920 of the Revised Statutes of the United States, 35 U.S. Code 69, give notice to the Plaintiff that, in further support of their allegations of invalidity predicated upon prior use, prior invention, prior publication and want of invention heretofore pleaded in the Answer and in connection with which a Notice Under R. S. 4920 has been previously served upon Plaintiff, Defendants supplement the

previous notice and allegations of the Complaint with the following:

Prior Publication, Knowledge and Use  
Winchel Manufacturing Co., and  
H. N. Winchel,  
116 North Pomona Blvd.,  
Brea, California. [22]

Stevens and Thuet,  
Aluma Door Company,  
Harry Berger,  
2165 West Cowles Street,  
Long Beach, California.

These instances of prior publication, knowledge and use were not given heretofore because they were not until this day discovered by Defendants.

Dated: October 29, 1951.

HUEBNER, BEEHLER,  
WORREL & HERZIG.

By /s/ VERNON D. BEEHLER,  
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 30, 1951. [23]

[Title of District Court and Cause.]

### MINUTE ORDER

Westover J.:

The Court finds the patent in issue is invalid because of prior invention, prior public use and for want of invention.

The Court also finds there is no evidence to support a finding of unfair competition and no evidence to support a charge of conspiracy.

Judgement will be rendered for defendants; Findings and Judgment to be prepared by counsel for defendants and presented to this Court by April 8, 1952.

Dated: March 19, 1952. [25]

---

[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Findings of Fact

##### I.

Plaintiff, Roscoe Fowler, is a citizen of the State of California, and resides in Los Angeles County.

##### II.

The Defendant, Vimcar Sales Company, is a corporation organized and existing under the laws of the State of California, and has a regular and estab-



lished place of business and is doing business in Los Angeles County within the Southern District of California, Central Division. [27]

### III.

The Defendant, Victor M. Carter, resides and has a regular and established place of business in Los Angeles County in the Southern judicial district of California. The defendant, Victor M. Carter, is the president, general manager and sole stockholder of the defendant, Vimcar Sales Company, and since 1948 has had control of all of the actions and activities of said corporation.

### IV.

Defendant, Morris J. Halopoff, resides and has a regular and established place of business in Los Angeles County in the Southern judicial district of California.

### V.

This action was instituted by the Plaintiff against the respective defendants jointly for alleged infringement of United States Letters Patent No. 2,516,196, granted July 25, 1950, upon an application of Roscoe Fowler filed November 14, 1949, the action being brought under 28 U.S.C. 1338(a), seeking the equitable remedy of an injunction and asking for an injunction and an accounting for profits and damages for said infringement and adding a prayer for treble damages. All three claims of the patent were involved.

## VI.

The Complaint included a second and separate cause of action instituted by the Plaintiff jointly against the respective Defendants for alleged unfair competition and a conspiracy among the Defendants to copy and manufacture and thereafter to sell products in imitation of plaintiff's product with the intent and for the purpose of confusing the buying public, said action being [28] brought under Section 28 U.S.C. 1338(b) and 15 U.S.C. 1121, 1126(h) and (i). The action based upon unfair competition and conspiracy seeks the equitable remedy of an injunction and asks for an accounting of profits and damages for said alleged acts of unfair competition and that the amount of said alleged damages be trebled.

## VII.

Defendants answered jointly attacking the validity of the patent, denying infringement thereof, and denying all charges of unfair competition and conspiracy.

## VIII.

Plaintiff was at the time of the institution of the suit and always had been owner of said U. S. Letters Patent No. 2,516,196.

## IX.

The subject matter of said Letters Patent No. 2,516,196 is an Adjustable Overhead Door Hinge employed primarily for overhead garage doors and consisting of a pair of hinges each incorporating a

bracket for attachment to the door jamb, a master arm pivoted at its mid-portion to the bracket, and at one end to an angle iron or side rail on the door, a cantilever arm pivoted at one end to the bracket and at its other end to a gusset plate attached to the side rail on the door, the cantilever arm being extendible for adjustment, and there being a counter-balancing spring attached at the end of the main arm remote from the door and attached to the door jamb below the plate.

### X.

Each of the three claims of Letters Patent No. 2,516,196 includes as an element a cantilever arm which is adjustable for [29] the purpose of adjusting the door to a vertical position, the means of adjustment being set forth in different phraseology in the three claims but covering essentially the same principle of alleged novelty.

### XI.

The patents, publications, and testimony of independent prior art uses listed below were offered in evidence by the Defendant as prior art and prior public use:

|                 |           |
|-----------------|-----------|
| Wentworth ..... | 1,177,749 |
| Mize .....      | 1,942,720 |
| Guth .....      | 2,162,381 |
| Wolf .....      | 2,166,898 |
| Ferris .....    | 2,170,295 |
| Holmes .....    | 2,228,314 |
| Peck .....      | 2,233,638 |

|                        |           |
|------------------------|-----------|
| Holmes .....           | 2,259,819 |
| Wread .....            | 2,441,742 |
| Englerth .....         | 934,149   |
| Claud-Mantle .....     | 2,185,214 |
| St. John, Jr. ....     | 2,213,320 |
| Gallagher, et al. .... | 2,255,769 |
| D'Alfonso .....        | 2,324,138 |
| Violante .....         | 2,425,905 |
| Fowler, et al. ....    | 2,523,207 |
| Smith .....            | 2,569,351 |

#### Publications

Building Supply News, issue of February, 1946,  
page 3, advertisement of Tavart Co., Ltd. [30]

Building Supply News, issue of January, 1947.

Western States A-E-C Catalog File 1946-47,  
section 12, advertisements respectively of Coffey  
Overhead Doors, Inc., Tavart Co., Ltd., Sturdee dis-  
tributed by W. H. Steele Co.

Western States A-E-C Catalog File 1947-48,  
section 12, advertisements respectively of Coffey  
Overhead Doors, Inc., Tavart Co., Ltd., Sturdee dis-  
tributed by W. H. Steele Co.

#### Prior Knowledge and Use

Tavart Company,  
15134 South Orizaba Avenue,  
Paramount, California.

Roscoe Fowler,  
6820 Brynhurst Avenue,  
Los Angeles, California.

Coffey Overhead Doors, Inc., and  
J. T. Coffey,  
4829 W. Pico Boulevard,  
Los Angeles, California.

Norman W. Smith,  
Earl F. Murphy,  
Newland Top Shop,  
4761 E. Olympic,  
Los Angeles, California. [31]

Winchel Manufacturing Co., and  
H. N. Winchel,  
116 North Pomona Blvd.,  
Brea, California.

Stevens and Thuet and  
Aluma Door Company,  
2165 West Cowles Street,  
Long Beach, California.

## XII.

The prior art, prior publications, and prior public use listed above, all of which were considered by this Court, illustrates numerous examples of overhead garage door hardware both of the pivot type and the jamb type.

## XIII.

The Defendants, Vimcar Sales Company, and Victor M. Carter, did not engage in the manufacture of any adjustable jamb type garage door hardware but engaged only in the marketing and sale of said adjustable jamb type garage door hardware. The Defendant, Morris J. Halopoff, was engaged primarily

in the manufacture of said adjustable jamb type garage door hardware to the extent that said hardware comprised the accused structure and Defendant, Morris J. Halopoff, supplied the hardware thus manufactured to the Defendants Vimcar Sales Company and Victor M. Carter.

#### XIV.

In the prior art and prior public use are examples which show adjustable jamb type garage door hardware with an adjustment at the jamb plate for adjusting the cantilever arm to place the garage door in a vertical position and adjustment at the end of the cantilever arm where it joins the door for precisely the same purpose. [32]

#### XV.

The differences disclosed and attempted to be claimed in Fowler Patent No. 2,516,196 over the prior art are so insignificant as to be the work merely of a skilled mechanic and do not involve patentable invention.

#### XVI.

The patentee Fowler of Patent No. 2,516,196 failed to carry his date of invention back of January, February, or maybe March of 1949.

#### XVII.

Various and sundry prior art users manufactured, used and sold adjustable jamb type garage door hardware the same as or substantially the same as the adjustable jamb type garage door hardware of the patent at a date prior to any alleged invention

of the patent in suit, and these prior art uses were not considered by the Patent Office when the patent in suit was issued.

### XVIII.

Various and sundry prior art users, including the plaintiff, manufactured, used and sold to the public generally adjustable jamb type garage door hardware the same as or substantially the same as the alleged invention of the patent in suit at a date more than one year prior to November 14, 1949.

### XIX.

Defendant's structure accused as being an infringement is substantially the same as the structure of the patent in suit and is an infringement of all of the claims of said patent if the the same is [33] valid.

### XX.

The evidence is not sufficient to show a conspiracy.

### XXI.

Since on or about 1945 the defendant Vimcar Sales Company, a corporation, has used the trade name "Olympic."

### XXII.

During the period of time that Defendant Vimcar Sales Company, a corporation, was selling plaintiff's adjustable jamb type garage door hardware, all such sales were made by it in its own name and with the use of its own trade name, "Olympic"; the sale by Defendant Vimcar Sales Company, a corporation, of Plaintiff's adjustable jamb type

garage door hardware under Defendant's name and trade name "Olympic" was with the consent and knowledge of the Plaintiff.

### XXIII.

The Defendant Morris J. Halopoff was engaged in the business of manufacturing jamb type garage door hardware approximately one year prior to the time that said Defendant met the other Defendants herein.

### XXIV.

The Defendants have not passed off on the public their adjustable jamb type garage door hardware as that of Plaintiff's, nor has the public been deceived by the Defendants, or any of them, as to the origin of the manufacture of said adjustable jamb type garage door hardware.

### XXV.

All adjustable jamb type garage door hardware sold by [34] the Defendant Vimcar Sales Company and manufactured by the Defendant Morris J. Halopoff for the Defendant Vimcar Sales Company bore or carried the mark "Olympic" and the name Vimcar Sales Company; each set of adjustable jamb type garage door hardware was packaged in an individual package, in which package there was placed an instruction sheet with the name "Vimcar Sales Company" plainly displayed thereon.

### XXVI.

The adjustable jamb type garage door hardware manufactured by the Plaintiff has no ornamental



or non-functional features, and any reproductions thereof by Defendants were of functional features only.

### XXVII.

At the time of the Defendant Morris J. Halopoff commenced manufacturing and selling adjustable jamb type garage door hardware to the Defendant Vimcar Sales Company the patent in suit had not yet issued. At the time the Defendant Morris J. Halopoff manufactured and sold adjustable jamb type garage door hardware to the Defendant Vimcar Sales Company, and at the time that Vimcar Sales Company first sold said adjustable jamb type garage door hardware under its own name, Vimcar Sales Company, and the mark "Olympic," the patent in suit had not issued. However, all of the Defendants were notified of the pendency and imminent issue of the patent in suit.

### XXVIII.

Defendant Vimcar Sales Company, a corporation, sold adjustable jamb type garage door hardware long prior to the time when it purchased adjustable garage door hardware from the Plaintiff. [35]

### Conclusions of Law

1. This Court has jurisdiction of the subject matter involved herein and of the parties hereto under the patent and trade-mark laws and the Judicial Code, more particularly R. S. Section 4121, 35 U.S.C. 70, Section 24 of the Judicial Code and

under 28 U.S.C. 1338(a), 1338(b) and 15 U.S.C. 1121, 1126(h) and (i).

2. Joint Fowler and Murphy Patent No. 2,523,207, issued September 19, 1950, on an application filed January 14, 1946, discloses the alleged inventive subject matter and is a prior invention.

3. Claims 1, 2 and 3 of said Letters Patent in suit No. 2,516,196 are invalid for want of invention over the prior art.

4. Claims 1, 2 and 3 of the patent in suit No. 2,516,196 are invalid because of prior invention.

5. Claims 1, 2 and 3 of the patent in suit No. 2,516,196 are invalid because of prior public use.

6. All claims of said Letters Patent in suit No. 2,516,196 are invalid but if valid, all of said claims would be infringed.

7. There has been no unfair competition on the part of any of the Defendants.

8. No acts by the Defendants in concert in any manner have been found sufficient to support a charge of conspiracy and [36] there has been no conspiracy.

9. The Complaint should be dismissed for want of equity and costs be allowed Defendants, including reporters' fees.

Dated at Los Angeles, California, this 6th day of May, 1952.

/s/ HARRY WESTOVER,  
Judge.

The foregoing Findings of Fact and Conclusions of Law are disapproved as to form.

Dated: April 26, 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff.

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

Dated: April 22, 1952.

HUEBNER, BEEHLER,  
WORREL & HERZIG, and  
VERNON D. BEEHLER.

By /s/ VERNON D. BEEHLER.

Dated: April 23, 1952.

/s/ BENJAMIN J. GOODMAN,  
Attorneys for Defendants.

[Endorsed]: Filed May 6, 1952. [37]

In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,

Defendants.

### FINAL JUDGMENT

This action having come to be heard by this Court was tried and argued by counsel for the respective parties and thereupon, and upon consideration thereof,

It Is Ordered, Adjudged and Decreed:

#### I.

That the Complaint herein be and hereby is dismissed upon the merits.

#### II.

Costs be awarded the Defendants to be taxed in the sum of \$. . . . . and that Defendants have execution for the same.

Dated this 6th day of May, 1952.

Los Angeles, California.

/s/HARRY WESTOVER,

Judge. [38]

The foregoing Final Judgment is approved as to form.

Dated: April ..., 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By.....,  
Attorneys for Plaintiff.

The foregoing Final Judgment is approved as to form.

Dated: April 8, 1952.

HUEBNER, BEEHLER,  
WORREL & HERZIG, and  
VERNON D. BEEHLER.

By /s/ VERNON D. BEEHLER.

Dated: April 8, 1952.

/s/ BENJAMIN J. GOODMAN,  
Attorneys for Defendants.

Receipt of copy acknowledged.

Lodged April 18, 1952.

Judgment entered May 6, 1952.

[Endorsed]: Filed May 6, 1952. [39]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Vimcar Sales Company, Victor M. Carter and  
Morris J. Halopoff, and to Their Attorneys,  
Huebner, Beehler, Worrel & Herzig, and Ben-  
jamin J. Goodman:

Notice is hereby given that Roscoe Fowler, the  
plaintiff above named, hereby appeals to the United  
States Court of Appeals for the Ninth Circuit from  
the Final Judgment entered in this action on May  
6, 1952.

FULWIDER & MATTINGLY,  
ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff-  
Appellant.

RWF/bdj

[Endorsed]: Filed June 5, 1952. [41]

[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents That St. Paul-  
Mercury Indemnity Company, a corporation or-  
ganized and existing under the laws of the State of  
Delaware, and duly licensed to transact business in  
the State of California, is held and firmly bound  
unto Vimcar Sales Company, Victor M. Carter and

Morris J. Halopoff, defendants in the above-entitled case, in the penal sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to said defendants, their successors, assigns, or legal representatives, for which payment well and truly to be made, the St. Paul-Mercury Indemnity Company binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, That Whereas, Roscoe Fowler, the plaintiff, is about to take an appeal to the United States Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered by the United States District Court for the Southern District of California, Central Division, in [42] the above-entitled case, on May 6, 1952, in favor of the defendants.

Now, Therefore, if the above-named plaintiff shall prosecute said appeal to effect and answer all costs which may be adjudged against him if the appeal is dismissed, or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 5th day of May, 1952.

[Seal]                    ST. PAUL-MERCURY  
   INDEMNITY COMPANY.

By /s/ W. A. LAWRENCE,  
   Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

   FULWIDER & MATTINGLY,  
   ROBERT W. FULWIDER.

By /s/ ROBERT W. FULWIDER,  
   Attorneys for Plaintiff-  
   Appellant.

I hereby approve the foregoing bond.

Dated the 5th day of June, 1952.

   EDMUND L. SMITH,  
   Clerk, U. S. District Court.

By /s/ CHARLES A. SEITZ,  
   Deputy.

[Endorsed]: Filed June 5, 1952. [43]



[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-  
ING APPEAL AND FILING RECORD  
THEREON

The plaintiff-appellant Roscoe Fowler, having on June 5, 1952, filed his Notice of Appeal from the judgment heretofore rendered in this action; now on application of said plaintiff-appellant, the Court being fully advised, and good cause appearing therefor:

It Is Hereby Ordered that the time in which plaintiff-appellant herein may docket his appeal in this cause and file the record on appeal with the Clerk of the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 15th day of August, 1952.

Dated at Los Angeles, California, this 30th day of June, 1952.

/s/ HARRY WESTOVER,  
U. S. District Judge.

Presented by:

/s/ ROBERT W. FULWIDER,  
Attorneys for Plaintiff-  
Appellant.

RWF/bdj

[Endorsed]: Filed June 30, 1952. [51]

In the United States District Court, Southern  
District of California, Central Division

No. 13002-HW Civil

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, etc., et al.,

Defendants.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

November 8, 1951

Appearances:

For the Plaintiff:

FULWIDER & MATTINGLY, by  
ROBERT W. FULWIDER, ESQ.

For the Defendants:

HUEBNER, BEEHLER, WORRELL &  
HERZIG, by  
VERNON D. BEEHLER, ESQ., and  
BENJAMIN J. GOODMAN, ESQ.

\* \* \*

OPENING STATEMENT ON BEHALF  
OF THE PLAINTIFF

Mr. Fulwider: The patent in suit will be Exhibit 1 for plaintiff, and I think, Mr. Beehler, we might stipulate now, if it is agreeable with you, that soft copies furnished by the Patent Office of the United States may be substituted in lieu of originals or certified copies by both plaintiff and defendant.

Mr. Beehler: So stipulated.

Mr. Fulwider: So I exhibit the original and ask [8\*] to have this soft copy marked. I have an extra copy here you might hand up to the judge, if you will, Mr. Clerk, for his own marking up purposes.

The Court: It may be received and marked Exhibit No. 1.

\* \* \*

Mr. Fulwider: As Plaintiff's Exhibit 2, I would like to introduce an actual set, or, rather, half a set, of plaintiff's hardware and have that marked.

Will you stipulate this is a piece of Sturdee hardware, Mr. Beehler?

Mr. Beehler: I will so stipulate.

The Court: It may be received and marked as Exhibit 2.

\* \* \*

Mr. Fulwider: As our Exhibit 3, I would like to have marked for identification—we can think about the matter of evidence later—this little model of hardware which is typical of both plaintiff's and defendants'. I might state that this particular

---

\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

model, I am informed, was made a couple of years ago while plaintiff was supplying hardware to Vimcar, [9] and several of these little models were supplied to Vimcar to assist them in selling. We happened to find this old one.

We have made this change. The models that were submitted to Vimcar at that time being purely advertising helps, did not have the particular adjustability in the jag link or pivot, so we have modified this by putting slots in the little pivot arm there so it is exactly like the patent and like our hardware except, as I say, some of the dimensions are a little bit different. So I think it ought to be marked just for identification.

\* \* \*

The Court: It may be received and marked Exhibit 3 for identification only. [10]

\* \* \*

Before going directly to the defendants' hardware, I would like to turn for a moment to the claims which, of course, are the real essence of any patent, and to facilitate the court's consideration of these, I have prepared some claim outlines or analyses, I call them, which I like to talk from, and probably your Honor would like one also. I have a copy here for counsel. May that be marked the next number?

The Court: Mark it Exhibit 4. [18]

\* \* \*

This, I believe, would be a good time to put in the defendants' hardware so that the court can see

how similar it is in all respects. This will be what number?

The Court: No. 5 would be next.

The Clerk: In evidence, your Honor?

Mr. Fulwider: I would like to offer this in evidence. I assume you will stipulate that is a Vimcar product?

Mr. Beehler: Where was it bought?

Mr. Fulwider: Builders Supply.

The Court: It may be received and marked Exhibit 5.

\* \* \*

Mr. Fulwider: So that there won't be any confusion between the two, your Honor will note that this hardware carries a little yellow label that says Olympic. [24]

\* \* \*

The Court. Mr. Beehler, will you come up here and show [25] me where the difference is between the two exhibits?

Mr. Beehler: There isn't any essential difference.

The Court: All right.

Mr. Fulwider: Good. We are agreed on that.

Just to complete the record on the identity and to give your Honor something that is a lot easier to handle than pieces of hardware, we have prepared a composite drawing in which we cut out the figures of the patent, and then we had a draftsman, used by both Mr. Beehler and our office, to draw the defendants' hardware in exactly the same position to the extent he was able by reason of its physical structure.

I would like, if I may, to offer that as Exhibit 6 so that we have something that is readily handled. I have a copy here for you. This is for identification, of course. It is merely illustrative.

The Court: It may be marked for identification only.

The Clerk: So marked, Plaintiff's Exhibit 6. [26]

\* \* \*

As further visual aid on this, and again principally to just facilitate things and make the record, I would like to offer as Exhibit 7 a pair of photos which we have hinged together. The left-hand photo shows the plaintiff's hardware partly assembled in about the same position as we had it up there on the clerk's desk. The right-hand photo shows the defendants' hardware in a similar position.

The Court: It may be marked Exhibit 7. Are they to be introduced in evidence? [27]

\* \* \*

The Court: When did the defendant start to make its hardware?

Mr. Fulwider: It started purchasing from the plaintiff in July, 1949. About two or three months, two or three months after the plaintiff first came on the market, they started purchasing, and then in the fall of 1949, negotiations were had between the defendants—— [28]

\* \* \*

The Court: Do I understand, except for that difference, it was practically the same?

Mr. Fulwider: Very similar, your Honor.

The Court: In other words, all you have done is change the slot to a bolt?

Mr. Fulwider: That is one of the main differences.

The Court: Is that what you base your patent on?

Mr. Fulwider: One of the most important features of this thing is that slotted pivot arm and its advantages over a sliding jamb bracket up here like Tavart has done, or try to fuss around with slotting down here on this end.

The Court: Let me see if I understand correctly. In the previous structure, there was just one bar but there was a slot on the end with which it was regulated?

Mr. Fulwider: That's right.

The Court: In your structure, there are the two bars, and it is bolted at the end?

Mr. Fulwider: Yes. The ends are fixed.

The Court: That is the main difference? [30]

\* \* \*

I have some more photos here which also were made of these two exhibits which are in evidence, the plaintiff's hardware, Exhibit 2, and the defendants', 5. These photos, like the preceding ones we offered—I offer this as Exhibit 8.

The Court: Exhibit 8 for identification.

\* \* \*

Mr. Fulwider: —show on the left-hand side the plaintiff's hardware with the door closed, and

on the right-hand side the defendants' hardware with the door closed.

That isn't actually a door in there. It is a two by four that we laid alongside the side rail to indicate the jamb. So we have placed legends on here indicating [31] which is the jamb and which is the door. They point out the similarity we are talking of.

Then we have one more photograph, which we will offer as Exhibit 9, showing that same hardware with the door rotated to full open position corresponding to the dotted outlines of Fig. 1 in the patent in suit.

The Court: It may be received as Exhibit 9 for identification only. [32]

\* \* \*

I would like to introduce at this time one of those instruction sheets which the plaintiff was using at that time and is still using and, as I understand it, one of these instruction sheets, or these instruction sheets with the name Econo-Jamb and Sturdee cut off were used temporarily in packing the Olympic hardware which plaintiff was selling to the defendant.

The Court: It may be marked Exhibit 10 for identification. [39]

\* \* \*

I would like to offer this, which I am informed is one of the first sheets printed by Olympic, that is, by Vimcar and supplied to Fowler for him to stuff into the boxes that he shipped to them.



The Court: It may be marked for identification only as Exhibit 11. [41]

\* \* \*

I would like to submit one of defendants' later sheets, which they are still making—I am not sure whether they are now making it, but which they were making as of early this year, and call attention to the fact that no substantial change, no significant change has been made or was made between the old sheets and the newer ones.

The Court: It may be marked for identification only as Exhibit 12. [42]

\* \* \*

I would like to put in one of the most current of Vimcar's sheets, so far as we are advised.

The Court: It may be marked Plaintiff's Exhibit 13 for identification only. [43]

\* \* \*

Mr. Fulwider: To illustrate the hardware sold by plaintiff, I would like to introduce in evidence a current folder, which will be 14.

The Court: It may be marked for identification only, unless it is stipulated. [45]

\* \* \*

Mr. Fulwider: Just one more exhibit of this type and then this part will be finished, that is a little brochure put out by Vimcar, which we offer as Exhibit 15.

The Court: Exhibit 15 for identification [46] only.

\* \* \*

I would like to offer on the matter of notice and wilfulness, to show that these people were notified as soon as we had knowledge of what they were doing, and that they were notified, as a matter of fact, even before the patent issue, some letters. Mr. Beehler and I have stipulated we can use photostats in lieu of the originals of these letters. I have here letters of infringement sent to Vimcar and to Halopoff, each dated March 10. Perhaps these can be clipped together as one exhibit, A and B.

The Court: All right.

The Clerk: The one to Vimcar will be 16 and the other 16-A, your Honor. [47]

\* \* \*

I have one other letter I think is pertinent to that same issue. That is a letter written to Huebner, Beehler, Worrell, Herzig and Caldwell which I would like to offer as Exhibit 17, written on August 7, 1950, after the patent issued.

The Court: That will be Exhibit 17. [48]

\* \* \*

Mr. Fulwider: Just one other exhibit, which can be stipulated to, and which we will offer in evidence as Exhibit 18, which is a catalog of the Builders Emporium, which is a corporation, as I understand from Mr. Carter's deposition, owned by him as a retail outlet. My thought would be since the catalog is fairly bulky, I have had photostats of the cover page and the one page pertaining to the case, and which we might stipulate we can merely put in with photostats, rather than burdening the record with the catalog itself, or put in the negative and

see if that shows up. It doesn't show up as clearly as the catalog, but we can refer to the catalog, if necessary.

Is that satisfactory to you, Mr. Beehler?

Mr. Beehler: That is satisfactory. [49]

\* \* \*

I would like to have introduced as our next exhibit, which I believe would be 19, a letter written on Vimcar stationery dated April 5, 1950, by Mr. Harry Korse, purchasing agent, which I assume that Mr. Beehler will stipulate is in fact a letter sent by his client Vimcar per Mr. Korse.

Mr. Goodman: We have no objection.

Mr. Fulwider: It is stipulated that may be received in evidence as our Exhibit 19 then.

The Court: It may be received and marked Exhibit 19. [53]

\* \* \*

The Court: If the catalog was published, did it use the name of the plaintiff's structure?

Mr. Fulwider: No. Vimcar always used its own name. We are not charging any unfair competition by reason of trade-mark infringement or trade name infringement.

The Court: Do I understand even when you sold your structure to Vimcar, Vimcar resold it under Vimcar's name?

Mr. Fulwider: That's right, your Honor, which they had a perfect right to do, of course.

The Court: They had a right to do it if you let them do it. [55]

\* \* \*

OPENING STATEMENT ON BEHALF  
OF THE DEFENDANTS

Mr. Beehler: Before making an opening statement, there is a witness here whom both counsel have now talked to, who came to identify certain photographs. We are in agreement that they can be stipulated to as exhibits. I would like to offer them while he is still here so he can be released.

The Court: How many pictures have you?

Mr. Beehler: Five snapshots.

The Court: Do you want them introduced as one exhibit?

Mr. Beehler: As one exhibit, A, B, C, D, and E.

The Court: They may be introduced as Exhibits A-1, A-2, A-3, A-4 and A-5.

The Clerk: In evidence, your Honor?

The Court: Yes, in evidence.

\* \* \*

Mr. Beehler: They are photographs of the installation [59] of jamb hardware at the Newland Tops Shop and they are stipulated to as having been installed in January of 1946.

\* \* \*

I believe at this point to trace the history very briefly of that jamb type hardware, I will offer in evidence the exhibits which were offered at the taking of the deposition of Mr. Fowler, and at the same time that deposition. [60]

The Court: It may be received. The deposition may be received and marked Exhibit B. [61]

\* \* \*

Mr. Beehler: I wish, therefore, to file now the original of the requests for admissions as Defendants' Exhibit next in order.

The Court: It may be received and marked Defendants' Exhibit C.

Mr. Beehler: With the accompanying photo-stats, four in number.

The Clerk: Those are all attached, your Honor. Shall they just be a part of Exhibit C?

The Court: Yes, part of Exhibit C. [63]

\* \* \*

I would like to introduce in evidence at this time page 28 of the Vimcar catalog No. 15, which is a full page showing of jamb type garage door hardware sold under the Tavart label, but sold by the Vimcar Sales Company.

The Court: It may be marked Exhibit D. First, can you tell me the date?

Mr. Beehler: The date of that particular catalog is February, 1948. [65]

\* \* \*

Mr. Beehler: That is a date which anticipates by more than one year the filing date of the patent in suit.

With respect to the advertising aid which appears on the court's bench, I call attention to that same page of the catalog, No. 15, in the middle of the right-hand side where the same advertising aid is pictured. It was then used as an advertising aid for the Tavart hardware, which was distributed by the defendant Vimcar. [66]

\* \* \*

## CARVEL MOORE

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

## Direct Examination

By Mr. Fulwider: [70]

\* \* \*

Q. What is your business or profession, Mr. Moore?      A. Industrial design.

Q. Do you do any work for the plaintiff, Mr. Fowler?      A. Yes.

Q. What has been the nature of your duties with him?

A. Designing and industrial advertising.

Q. How long have you been doing that work for him?      A. Oh, for about five years.

Q. During the course of your work for Mr. Fowler, have you had occasion to take photographs of hardware manufactured by him?

A. Yes, as aids to advertising.

Q. As part of your business, do you do photographing generally?      A. Yes.

Q. To what extent are you familiar with photographs, taking them, processing them, converting them into printing aids, and so forth?

A. All of that would be incidental to the advertising.

Q. That is a standard part of your [71] business?      A. Yes.

\* \* \*

(Testimony of Carvel Moore.)

Q. (By Mr. Fulwider): Will you examine this photograph, Exhibit 21, and identify it for me, if you can, and compare it with the cut on Exhibit 14?

A. It is the same photograph.

Q. Do you find any particular points of similarity there that are the basis of your opinion that it is the same photo?

A. I would say the nail and the flexible conduit, and the junction box.

Q. Would you point out those to the court?

The Court: You will have to speak aloud. The reporter has to get your testimony.

The Witness: It would be the flexible conduit coming [72] between the studs, and the nail right above the power arm, and the junction box appearing right below the bracket, the jamb bracket.

Q. (By Mr. Fulwider): Can you tell me approximately, or do you know approximately when that part of Exhibit 21 was made, that is to say, when the negative was photographed?

A. It would be in the fall of 1949.

Q. The fall of 1949. Was that part of some other photographs that you made, or do you recall?

A. Yes. This was part of a series we took upon the request Mr. Fowler received from Vimcar.

Mr. Fulwider: I have three other photographs which I should like to mark as an exhibit with one number and then A, B, C, if I may, because I would like to tie them in to one of our previous exhibits.

The Court: They may be marked Plaintiff's Exhibits 22-A, -B and -C.

(Testimony of Carvel Moore.)

The Clerk: In evidence, your Honor?

The Court: In evidence.

The Clerk: So marked.

(The photographs were received in evidence and marked Plaintiff's Exhibits 22-A, 22-B and 22-C.)

Q. (By Mr. Fulwider): Now, Mr. Moore, I call your attention to three photos, 22-A, -B and -C, and ask you if you can identify those photographs for me, and in so doing compare [73] 22-B with 21 that you were just looking at.

A. This photograph, Exhibit No. 21——

Q. That is the one which I believe is a reverse print of B.

A. The photograph of Exhibit 21 is the reverse of the photograph marked No. 22-B.

Q. Do you have the negatives for all of those photographs, Exhibits 21 and 22? A. Yes.

Q. If you will, lay photographs 22-A, -B and -C out in order from left to right, and then compare them with Plaintiff's Exhibit 15, which is a Vimcar brochure, which on its reverse side shows three prints or three cuts. Will you compare those and see if you find any similarity between the three exhibits, 22-A, -B and -C, and the three pictures on this brochure, Exhibit 15, and if you see any similarity, will you point out to the court some of those similarities sufficient upon which to predicate your opinion.

A. They are taken from the same photographs.



(Testimony of Carvel Moore.)

There has been some art work applied to the background to touch out some of the objectionable points of the photograph.

Q. In 22-A, I believe there is a nail and nut that show up in the studding. Is there a similar nail and knot apparent in the left-hand photograph on 15?

A. Yes, the nail and the knot hole in the studding to [74] the left of the hardware.

Q. Are there any other particular points there that you see?

A. I think all the pertinent points of the photograph, the tar paper background, the position of the door, and the hardware.

Mr. Fulwider: I wonder if we may, your Honor, have the witness mark on the top, the left-hand photo, the letter A, so that we can know that is the one he compared to our Exhibit 22-A, just put an A right above in there.

The Court: Yes.

(Witness complying.)

Q. (By Mr. Fulwider): And while you are at it, put a B and C here, and then it is all done.

(Witness complying.)

Q. Now, will you compare the center cut B with our 22-B in the same manner?

A. I would say it is the same photograph. However, the hardware on the left, that is the hardware in the closed position, has been touched out of the photograph with an air brush.

(Testimony of Carvel Moore.)

Q. So that cut B in Exhibit 15 is only half, so to speak, of the photograph 22-B? A. Yes.

Q. That is the right half? [75] A. Yes.

Q. I believe that one also has a nail up in the studding there.

A. It shows the same condition with the nail in the studding and the flexible conduit coming down between the two studs.

Q. Will you make the same comparison between the cut C on Exhibit 15 and the photograph 22-C?

A. The same touch-up has been applied there. The left of the jamb has been air brushed. However, the background remains with the studding showing, the same position of the hardware, and the door stop appears at the bottom.

Q. Did I ask you, can you tell me approximately when these photographs, 22-A, -B and -C were taken? Did you take them? A. Yes.

Q. And when? A. In the fall.

Q. You took them, you say? A. Yes.

Q. That was in the fall of 1949? A. Yes.

The Court: In 1949?

Mr. Fulwider: Yes, your Honor.

Q. (By Mr. Fulwider): And these particular prints in [76] evidence, you had made from photographs in your possession, did you not?

A. That is correct.

Q. And you gave them to me?

A. Yes, that's right.

Q. Incidentally, will you compare this cut on page 2 of plaintiff's Exhibit 18, which is the Build-

(Testimony of Carvel Moore.)

ers Emporium catalog, and tell me whether or not the cut shown in the upper left-hand corner of this is the same or different from the right-hand half of 22-B.

Mr. Fulwider: This cut is the one shown here, your Honor, in this photostat. This is a little more clear here than it is there.

The Witness: It is the same photograph, the same condition prevails where a touch-up has been done to the left of the hardware to take out the background.

Q. (By Mr. Fulwider): Mr. Moore, will you examine Exhibit 10, which is the Econo-Jamb instruction sheet put out by Mr. Fowler, and can you tell me who did the art work on that?

A. I did the art work.

Q. When was that art work done?

A. In February, 1949.

Q. In February, 1949. Have you done all of Mr. Fowler's art work since then, so far as you [77] know?      A. Yes.

Q. Have there been any modifications of any instruction sheets for the Econo-Jamb made by you?

A. No, sir.

Q. Do you know of any put out by Mr. Fowler?

A. No.

Q. To the best of your knowledge, the use of Exhibit 10 was started by Mr. Fowler in—February, did you say?      A. Yes.

Q. —1949, and it is continuing to date?

A. Yes.

(Testimony of Carvel Moore.)

Mr. Fulwider: I think Mr. Beehler has only stated exhibits of Vimcar's instruction sheets were theirs. I would like to take a few minutes to prove by this witness—

The Court: Exhibit 10 has never been introduced in evidence, according to my record.

Mr. Fulwider: Thank you very much. I now offer it in evidence.

The Court: It may be received in evidence.

The Clerk: So marked, Exhibit 10.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Fulwider: I would like to prove up these three Vimcars here by having this witness compare them with Exhibit 10, and those are Exhibits 11, 12 and 13. [78]

Q. I show you here, Mr. Moore, Exhibits 11, 12 and 13, which have been stipulated to be Vimcar instruction sheets, and ask you if you have compared those or similar sheets with Exhibit 10, and whether or not you can tell me that there are any substantial differences?

I call your attention first to Exhibits 11 and 12.

A. No. The art work is identical. The only change that has been made is, as pointed out previously, in the title.

Q. Now, will you compare Exhibit 13 with Exhibits 11 and 12, and I call your attention particularly to the bracket indicated here in Fig. 2, and the two lag screws, whereas the bracket in Fig.

(Testimony of Carvel Moore.)

2 in Exhibit 11 has three, and there is a little difference in the corner.

Can you tell me whether or not you have found any other differences than those two I mention there?

A. The bracket has been changed in steps 4 and 5 of Vimcar's instruction sheet.

Q. In the same manner as changed in 2?

A. In the same manner as changed in step 2.

Q. You find no other differences?

A. Other than that, the art work is identical.

Mr. Fulwider: I offer that in evidence, your Honor, as 13. [79]

The Court: 13 has already been introduced in evidence. 14 has not been received in evidence.

Q. (By Mr. Fulwider): I call your attention, Mr. Moore, to the Sturdee brochure, Exhibit 14. Can you identify that for me?

A. Yes. This is a brochure I prepared for Sturdee steel.

Q. You did the art work in it and the general layout for it?           A. Yes, sir.

Q. Can you tell me approximately when that art work and layout was done and that brochure was printed? Maybe not that particular piece of paper, but that style.           A. This is a re-run.

Q. This particular one is a re-run?

A. Yes. I would say it was re-run in the fall of 1949.

Q. When was the original art work and the first printing?

(Testimony of Carvel Moore.)

A. The first printing was in February, 1949.

Mr. Fulwider: I offer that in evidence, your Honor.

Mr. Beehler: I couldn't hear the witness.

Mr. Fulwider: He said the first printing was in February, 1949.

Mr. Beehler: Thank you. [80]

Mr. Fulwider: 14 is offered in evidence, your Honor.

The Court: It may be received.

The Clerk: So marked, Plaintiff's Exhibit 14 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

The Court: May I just be sure that I have something straight here?

Mr. Fulwider: Yes, your Honor.

The Court: According to this witness, that original run was in February, 1949. The application for your patent was not until November of that year.

Mr. Fulwider: That is correct, your Honor.

The Court: This original run was in February and the application for patent was in November of that year.

Mr. Fulwider: Yes, the same year. We were cutting it very close.

The Court: All right.

Q. (By Mr. Fulwider): Can you tell me the circumstances surrounding the making by you of

(Testimony of Carvel Moore.)

these photographs, Exhibits 22, which you have previously identified here as made by you? Do you have any recollection as to the occasion of making those photographs, for whom they were made, or why they were made?

A. Yes. Mr. Fowler contacted me on a Friday evening [81] as a result of a request from Vimcar to take some advertising photographs of Econo-Jamb. Mr. Fowler and I took them on Saturday morning. They were processed over the week end, and one set was mailed to Vimcar the following Monday. This was in August, 1949.

Q. Who did that mailing?

A. I did the mailing.

\* \* \*

### Cross-Examination

By Mr. Beehler:

Q. May I ask the witness if he was the photographer of the photographs which were used on the cut of the brochure which he compared with the photographs he said he made?

A. Are you referring to Vimcar's brochure?

Q. Vimcar's brochure, yes.           A. Yes.

Q. You are the photographer of the photographs used in the cuts?

A. Yes. I took the photographs for Sturdee, which were forwarded to you.

Q. Did you make the photographs which were used in making the cuts? [82]

(Testimony of Carvel Moore.)

A. Yes. I would have no evidence whether you used our photographs or copied them.

Q. Your comparison then was one of eye appearance alone, is that correct?

A. The physical specifications on each photograph.

Q. Were you aware Vimcar was using all those photographs as its own, for their own advertising publication ever since you photographed them and gave the photographs to Mr. Fowler?

A. I would assume that is what they were used for. They were furnished for sales.

Q. When you made the drawings of the original instruction sheets for the Econo-Jamb, Exhibit 10, where did you get the information?

A. Obtained the information from Mr. Fowler, Sturdee Steel.

Q. Was that information given to you as information concerning a specific structure or was that given to you as standard carpenter instruction variety?

A. That information is usually forwarded through door hangers' information or through the information developed by the manufacturer in his own shop.

The Court: May I ask a question? When you got this information, were you given pictures or drawings, or was it oral information that you [83] got?

The Witness: No, sir. We usually prepare the drawings from a set of the hardware in their own



(Testimony of Carvel Moore.)

shop, or he supplies me with a set of hardware to draw from.

The Court: And did he supply you with a set of hardware to make drawings from?

The Witness: I took the dimensions off a set existing in the shop on a test stand there.

The Court: Then you got your information direct from a set of hardware?

The Witness: Yes.

Q. (By Mr. Beehler): From what did you get the information with respect to the joists and construction of the garage itself, to which the hardware was applied?

A. I would say that was strictly artistic license on drawing that arrangement of studding. There are quite a few variations that could be made on that. That is the architectural feature, and not the hardware.

Q. Will you read, please, the directions on Exhibit 10 the portion that I indicate here with the circle?

A. "Thickness of door."

Q. "Thickness of door." Go ahead.

A. "The distance T from the inner face of the header to the inner face of the jamb should not be more or less than  $\frac{1}{2}$ " the thickness of the door."

Q. Now, will you read what it says here where I am [84] indicating?

A. " $20\frac{1}{4}$ " plus door thickness."

Q. Now, will you compare that with this language indicated in the circle A?

A. Do you want me to read it out loud?

(Testimony of Carvel Moore.)

Q. If you will, please.

A. "Thickness of door. The distance 'A' from the inner face of the header to the inside of the jamb should not be more or less than  $\frac{1}{2}$ " the thickness of the door."

Q. That is identical, is it not?           A. Yes.

Q. Now, will you read B?

A. "20 $\frac{1}{4}$ " plus door thickness."

Q. That is identical, is it not?           A. Yes.

Q. Were you the artist who prepared the sketches on this sheet which I show you here?

Mr. Fulwider: What is that sheet?

Mr. Beehler: I asked him if he recognizes it.

Mr. Fulwider: I'm sorry.

The Witness: No.

Q. (By Mr. Beehler): Do you recognize the name of this company?           A. No.

Mr. Beehler: I would like to introduce this sheet in [85] evidence as Defendants' Exhibit next in order for the purpose of showing that such language is purely instructional and is a part of the public domain.

Mr. Fulwider: Object to the offer at this time because I don't think there has been anything about when it was put in, whether that is prior to Mr. Moore's instruction sheet.

The Witness: I would say that this drawing here is taken off—

The Court: Just a minute. There is no question put to the witness. I don't know whether they want you to volunteer any information or not.

(Testimony of Carvel Moore.)

The Witness: He asked me if it was the same. I am sorry.

The Court: We will have it marked for identification only until you can establish the time. If it was after, I don't know whether it makes any difference or not. If it was before, it might make a lot of difference.

Mr. Beehler: Then may I have it marked for identification?

The Court: It may be marked Defendants' Exhibit E for identification.

The Clerk: Defendants' Exhibit E for identification.

(The document referred to was marked Defendants' Exhibit E for identification.)

The Court: I notice it is 3:00 o'clock and I anticipate [86] I have some other business in chambers, so we will take our recess now. We will recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Q. (By Mr. Beehler): I asked you one question, I believe, with respect to your knowledge of Vimcar possibly using photographs.

Did you know, also, that the instruction sheet which you prepared was to be used by purchasers of the hardware of Sturdee?

A. Not at the time it was made. I made the sheet in February.

(Testimony of Carvel Moore.)

Q. You knew that, however, a few months later, did you not?

A. That was strictly a dealing between Mr. Fowler and Vimcar, not myself. I didn't handle the sheets at all.

Q. Did you know that?

A. I knew of it later, yes.

Q. You said, too, I believe, that the photographs which you took and identified—I don't recall the exhibit numbers, but they were three in number.

A. 22-A, -B and -C.

Q. You said they were released in about February, 1948, am I correct?

A. No. August of 1949. [87]

Q. August of 1949. Were there not some photographs here which you took in 1948?

A. No, sir.

Q. Do you have any written records as to when you released those photographs?

A. Yes, through invoices.

Q. Do you have them here or are you testifying from memory?

A. No. I checked my invoices before this case came to court.

Q. What was the date when you first made a photograph of the Sturdee jamb type hardware?

A. The first photograph was made in February, 1949.

Q. The first photograph you ever made of the Sturdee jamb type hardware, when was that?

A. 1949, February.

(Testimony of Carvel Moore.)

Q. Do you have records to substantiate that?

A. Yes.

Q. Did you testify from memory as to that?

A. No. As I say, it was taken from the invoice records. That would be the only record I would have of when I took a photograph, is when I invoice the customer.

Q. Do you have the invoices here?

A. No, I don't have my file with me, no.

Q. Do you know who did Mr. Fowler's art work before [88] you began in February, 1949?

A. No.

Mr. Beehler: That's all.

Mr. Fulwider: I would like to ask one more question. [89]

\* \* \*

### SAM BAIRSTOW

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider: [92]

\* \* \*

Mr. Beehler: May I also answer the court's question about duplicating a piece of hardware? Plaintiff's counsel has hit it, I believe, when he said if we copied the ornamental features of a non-patented piece of merchandise, there might be some

(Testimony of Sam Bairstow.)

room for a charge of unfair competition. That I understand to be the law. [98]

Mr. Fulwider: I didn't say ornamental. I said non-functional in qualifying that.

The Court: Do you mean ornamental?

Mr. Fulwider: No, no. There is nothing ornamental about that.

The Court: There is nothing ornamental about this that I can see.

Mr. Fulwider: It doesn't look ornamental to me. [99]

\* \* \*

### MORRIS HALOPOFF

called as a witness by and on behalf of the plaintiff, under Section 43(b), having been first duly sworn, was examined and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Fulwider: [102]

\* \* \*

Q. And was it the hardware that is involved in this suit, this Olympic hardware, which is our Exhibit 5? I will show you Exhibit 5 here and ask you first if you can identify that as of your manufacture, and secondly, is that the hardware you had in your place of business, about March 1, when Mr. Fowler called on you?

A. Yes. [104]

\* \* \*

Q. Do you do any assembly before you ship it?

(Testimony of Morris Halopoff.)

A. We complete the whole job.

Q. You assemble it and box it?

A. Right. [105]

Q. Put instruction sheets in it? A. Yes.

Q. And ship it to Vimcar? A. Yes.

Q. A set like this? A. Yes.

\* \* \*

The Court: Did you make these sets from a model or did you make them from a diagram?

The Witness: Well, it has been taken from, I believe, three or four sets, and then some of the improvements I have to do myself with my boys.

Q. (By Mr. Fulwider): Would you speak up just a little bit? I am having trouble hearing you.

The Court: The sets you made then weren't copied from any one model, is that correct?

The Witness: Not from one model, no. It has been copied from about three models besides the improvements I made myself.

The Court: You made some improvements yourself?

The Witness: Yes, with my boys. [106]

Q. (By Mr. Fulwider): What three models did you copy in evolving the present Vimcar Olympic hardware?

A. Well, Tavart, Standard, and Sturdee.

Q. And you took, then, I assume, the best features of all; is that correct? A. Well, I have.

Mr. Fulwider: May I have that answer?

(The answer was read by the reporter.)

(Testimony of Morris Halopoff.)

Q. (By Mr. Fulwider): You mean you did?

A. Yes, I picked out the best features, yes.

Q. So the particular set you put out, in your opinion, then, combined the best features of Tavart, Standard, and Sturdee? A. That's right.

Q. Did you have a Tavart set in your plant prior to starting the manufacture of the present Olympic hardware, or did you go out and see a Tavart somewhere?

A. I have seen Tavarts somewhere.

Q. You didn't have one in your plant to assist you? A. Later, I did have.

Q. But not at the beginning when you started manufacture?

A. Well, at the time when I was getting ready to manufacture, I had all three sets. [107]

\* \* \*

Q. You had been making Standard previously?

A. That's right.

Q. And so then you bought a Tavart and a Sturdee? A. That's right.

Q. Did you buy an Olympic?

A. No. I asked Mr. Donner at the time where I could—if they had in mind what kind of set they wanted, and so he sent me over to Petco Products. I got a set off of there and I didn't think too much of it.

Q. How was it constructed? Did they manufacture it?

A. No. They are also a sales organization, the same as Vimcar.



(Testimony of Morris Halopoff.)

Q. What hardware was that, Petco?

A. Well, it was so complicated, I couldn't explain?

Q. Was it jamb hardware?

A. It was—You can't even call it jamb or pivot. It was, you might say, in between.

Q. Mr. Donner suggested you go over and look at that [108] as possibly something that he wanted?

A. He said that, and he says, "We have got a set right here." He said, "Ask Mr. Korse to give you a set." So I asked him and got a set from there, also. That was the time I found out it was similar to Sturdee.

Q. So he gave you a set of his Vimcar Olympic hardware, and it was then that you found out it was the same as Sturdee?

A. That's right.

Q. Then was it an Olympic set or one manufactured by Sturdee and sold under their own trade-mark that you copied?

A. Well, it was in a carton. I don't know. It said "Olympic."

Q. It said "Olympic" on it?

A. That's right.

Q. And it was your understanding that was made by Sturdee, but sold by Vimcar under that name?

A. I didn't know who it was made by.

Q. You didn't know that then. Your answer is in the affirmative?

A. No.

Q. With whom at Vimcar did you have your first conversation concerning manufacturing the hardware for them?

A. Mr. Donner.

(Testimony of Morris Halopoff.)

Q. Mr. Donner. He came out to your place and talked [109] to you?

A. Well, at the time when he came out there, I was out of town. When I came back from my trip, well, my boys told me that Mr. Donner wanted to see me, had his phone and everything, so I called him up and made an appointment with him at that time.

Q. Where had you gone out of town, just as a matter of curiosity?

A. I had been out of the state, in Oregon.

Q. In Oregon. What was the date of your return from that trip?

A. I can't remember.

Q. Can you give us any approximate date?

A. Maybe one of my boys here probably could. I think it was around about November or December.

Q. Of 1949?

A. 1949.

Q. What is Mr. Donner's position with the defendant Vimcar?

A. I don't know.

Q. Did you ever deal with Mr. Carter?

A. Well, I started to know Mr. Carter after we started manufacturing.

Q. You met him after you started manufacturing?

A. I mean the first order, when we took the first order. [110]

Q. As I recall your deposition, you testified that you met him a matter of weeks after you had had your first discussions with Mr. Donner.

A. Well, no, my first discussion was with Mr. Donner a few times before I even met Mr. Carter.

(Testimony of Morris Halopoff.)

Q. How early were those first discussions with Mr. Donner then?

A. It should be around about January, I [111] think, 1950.

\* \* \*

Q. Do you have any recollection as to when it was, having in mind that your first delivery, so far as you know, was to Vimcar in the first part of February?

A. Yes. Well, the first purchase order was February 7, 1950.

Q. February 7, 1950?                      A. That's right.

\* \* \*

Q. Your best recollection now is what, then?

A. It should be around about in January, middle of January, 1950.

Q. That was the first time you saw Mr. Donner?

A. I believe it was.

Q. And where was that meeting held? [112]

A. At his office.

Q. What did he say to you?

A. Well, he told me, asked me if I was interested in manufacturing for him overhead hardware.

Q. And did you ask him what kind of overhead hardware he wanted?

A. Well, he wanted 8-inch clearance.

Q. Did he tell you that they were manufacturing hardware then?                      A. No.

Q. He didn't tell you anything about that?

A. He didn't say anything at that time.

(Testimony of Morris Halopoff.)

Q. And you didn't see any hardware around his place? A. No.

Q. How long did it take you to tool up? First, before we get into that, what did Mr. Donner ask you to do in that conversation?

A. I didn't quite get that.

Q. What was the result of the conversation, to shorten it up, what was the result of the conversation?

A. I was interested in manufacturing hardware if I could produce the right type that they were looking for.

Q. So he gave you some Vimcar hardware and told you to go over and look at the Vimcar hardware and design one for him, is that it? [113]

A. He didn't give me any.

Q. He didn't give you any Vimcar hardware?

A. He told me to go down to Petco to see their hardware, and also asked me to see Mr. Korse.

Q. To see Mr. Korse?

A. And get a set from him.

Q. So then you went to see Mr. Korse and he gave you a set of Vimcar hardware, Olympic hardware? A. That's right.

Q. Then did you have any other conversations with Mr. Donner? A. Not that moment.

Q. What did you do with the Vimcar hardware, the Olympic hardware? You took it with you, I assume? A. Took it to the shop.

Q. To your shop? A. Yes.

Q. What did you do with it?

(Testimony of Morris Halopoff.)

A. Opened it up.

Q. And looked at it?

A. Yes, and found out, why, it was the same as the Sturdee set. So I started working and making changes.

Q. You had previously examined a Sturdee set, then?

A. Well, I did get the Sturdee's and the Tavart's.

Q. You had gotten Tavart and Sturdee before you had [114] this conversation with Mr. Donner, this first conversation?      A. Oh, no, no.

Q. When?

A. After we made arrangements to make a set for Mr. Donner, to get the right kind of set that he was looking for, why, then I started looking for sets so I could make an 8-inch clearance.

Q. Then on that first conversation he neither gave you any Vimcar hardware or even told you that they were making hardware, is that correct?

A. That's right.

Q. And he recommended you go see Petco. Did he recommend any other place to go see hardware, to get some hardware?      A. No.

Q. All he wanted you to do was make 8-inch hardware?      A. That's right.

Q. Gave you no guides whatsoever as to how it was to work?      A. No.

Q. Did he tell you it was jamb hardware?

A. I knew it was jamb hardware when he wanted 8-inch clearance.

(Testimony of Morris Halopoff.)

Q. So as a result of that conversation, if I understand you correctly, then you went out and you bought a [115] Sturdee hardware and you bought a Tavart hardware, and you looked at the Petco hardware, is that correct?

A. That's right.

Q. Did you look at any other hardwares?

A. Yes, a few others on the doors.

Q. On doors. But you didn't buy any of those?

A. No.

Q. Then you had another conversation, I take it, with Mr. Donner. The one you were telling us about was not the first one, but a second one, is that right?

A. We had a few conversations after that.

Q. So this was a later conversation. About when would that be with respect to the first conversation?

A. I imagine about a week later.

Q. About a week later. What did you do? Did you tell Mr. Donner at that time as to whether you could supply him?

A. I didn't say anything about supplying. It was only just a matter of getting the right set. I told him that we were trying out different ways to get that 8-inch clearance.

Q. And was that conversation in his office or yours? A. At his office.

Q. So you didn't have anything to show him yet?

A. No.

Q. You just told him you were working on [116] it? A. That's right.

(Testimony of Morris Halopoff.)

Q. Did you tell him you had a Sturdee and a Tavart then?      A. No.

Q. You didn't tell him that?      A. No.

Q. Did you ask him for any ideas he had on how he would like to have his hardware made, other than the 8-inch hardware?

A. No. He was interested in 8-inch clearance.

Q. And that's all?      A. Yes.

Q. He didn't tell you anything at all that would lead you to suspect even that they were then selling garage hardware?      A. No.

Q. Vimcar?      A. No.

Q. And did you know that they were selling garage hardware?

A. Not until I got that first set from him.

Q. This is still a third conversation, then, I take it, when you got the set from Mr. Korse, or was it that second conversation?

A. It was in the second conversation, I think, I got [117] that set from Korse.

Q. So in the second conversation you told Mr. Donner that you didn't have anything to show him yet and he suggested you go down and see Mr. Korse, because he had some hardware that would be satisfactory, that's right, isn't it, if you could duplicate it?

A. You are asking me the same question over and over.

Q. No, it is not the same question.

Mr. Fulwider: Will you read the question, please?

(Testimony of Morris Halopoff.)

(Question read.)

Q. You can answer that yes or no.

A. I believe it is, yes.

Q. Then you did pick up a set from Korse and took that home with you?

A. Took it to the shop.

Q. And you compared that to the Sturdee set you had already bought?      A. That's right.

Q. And to the Tavart set that you had bought?

A. That's right.

Q. And you noticed that the Olympic set was the same as the Sturdee?      A. That's right.

Q. Did it occur to you that if Mr. Donner was satisfied with the Olympic set that he was selling, and it was the [118] same as the Sturdee set, with which you were familiar at the time, that perhaps the Sturdee set would be satisfactory to him?

A. Well, I made the set up. I didn't say anything to him. I made the set up and then showed him the set. I told him I had a few of them that I tried at the shop out there and——

Q. Now, which conversation is this? Is this the one you are just telling us about?

Mr. Fulwider: I am sorry it takes so long, your Honor, with this witness.

The Witness: I think about the third conversation.

Q. (By Mr. Fulwider): About the third conversation?      A. Yes, that's right.



(Testimony of Morris Halopoff.)

Q. How much later after the first conversation was that one?

A. It must have been about pretty close to two weeks.

Q. About two weeks. So you had first one conversation, and then a week later another one, and a week later another one. In the meantime, you had been experimenting, is that right?

A. That's right.

Q. Then you told him what? Did you show him the sample?

A. I showed him the sample and that was the time when [119] I met Mr. Carter.

Q. That was when you met Mr. Carter?

A. Yes.

Q. Then I assume the three of you sat down and talked it over, and you quoted him a price, and he said they would buy so many if you would make them, is that right?

A. That's right.

Q. To the best of your recollection, that was in January some time?

A. Some time early in January.

Q. How long did it take you to tool up to make those? How long a time elapsed between that and your production time?

A. Very short, about two weeks, probably sooner than that, because I had most of the dies of my own.

Q. You recall in your deposition in answer to a similar question, you said a month or maybe five or six weeks after you decided to manufacture them.

A. Well, it wasn't very long. I couldn't tell you

(Testimony of Morris Halopoff.)

exactly. I couldn't remember right up to the minute, you know.

Q. Have you done something or checked some records since the deposition so that you have a better remembrance now than you did when we took your deposition last month?

A. No. All I checked is when we started and when we [120] got the purchase order, and it was a few weeks before that.

Q. You received the purchase order February 7th, and did you make your first delivery February 7th?

A. The first delivery was on February 15.

The Court: Of 19 what?

The Witness: 1950.

Q. (By Mr. Fulwider): How much did your tooling cost you that you had to make for the Olympic hardware?

A. Well, I had most of my tooling, which I had been manufacturing for Standard. I don't believe it cost me over \$300 for the additional tooling. [121]

\* \* \*

Q. You took this set of Vimcar hardware home with you. How long did it take you to make up your mind that that might answer the problem Vimcar had for a good set of hardware?

A. Well, it took about a week and a half before I tried out a few different sets and made one set to show part of a sample.

Q. That is, you made it, after you got your Vimcar hardware, you still experimented and you made

(Testimony of Morris Halopoff.)

a set? Did [122] you make more than one experimental set?

A. In the shop I made about a half dozen of them, maybe more.

Q. Was that before or after you saw the Vimcar hardware?

A. There was a few of them before I seen Vimcar. I have forgot how many there were, and then after I ran into a Sturdee set, and then got Vimcar's, then I combined them all three together, besides the little changes we made ourselves.

The Court: May I ask a question?

Mr. Fulwider: Yes, your Honor.

The Court: What improvements did you make?

The Witness: The improvements we made, he has got the bushing, what we call for the main pivot there, is on a solid piece, and what we have is a bushing, reamed out more.

The Court: Can you show on the exhibit what the improvement was you say you made?

Mr. Fulwider: You just beat me to it by one question, your Honor.

Q. (By Mr. Fulwider): Here is the Olympic hardware. Will you point out to the court each and every improvement you made over the Sturdee previous Olympic hardware?

A. This here, right here, see. This is interchangeable, and the Sturdee is not interchangeable. They are riveted on this side here. It is all in one piece. [123]

(Testimony of Morris Halopoff.)

Q. You mean that they rivet their part to this arm?      A. Yes.

Q. And you just bore a hole there——

A. This particular one here has no bearing in there or bushing. All ours got a bushing in there, a washer this way and a washer there, and also threaded to this here plate, making it have a lock washer and nut in back of it, so in case they have trouble here, they could interchange it in a short time. [124]

Q. It is just the same except you don't have the bushing?      A. Yes, and——

Q. Then it is cheaper to do it without a bushing, isn't it?      A. No.

Q. Isn't it?      A. No, it is the same.

The Court: You were going to point out something else. What else was there?

The Witness: And this offset out here where they have it round.

The Court: You have got a straight line and they have a rounded offset.

The Witness: That is right. And then we have another two holes out here so that it could be used for lightweight doors, aluminum doors.

Q. (By Mr. Fulwider): Would you point out the bushing in here that you had reference to?

A. There is no bushing.

The Court: There is no bushing in that.

Q. (By Mr. Fulwider): This is Sturdee.

A. That is riveted out there, and then they have got this round here, and ours is straight.

(Testimony of Morris Halopoff.)

Q. Yours is offset by just bending it down? [125]

A. That's right.

Q. And theirs is done with some kind of a forming tool or on a machine?           A. I don't know.

Q. You say this cannot be taken apart then, is that it?

A. No, you have to chisel that off, grind it off.

Q. The difference between this and yours is that you can't unscrew the nut and take it apart?

A. Yes.

Q. What other difference did you point out, other than this difference in shape, and you say you had another hole?

A. Yes, two more holes out there.

Q. How many are on there?

A. This particular one hasn't. We added two more holes.

Q. This has five, is that right?

A. Yes, and all ours come out, have been coming out, with eight holes for some time.

Q. But the first ones you made had just the same number of holes as this?           A. Yes.

Q. If you lay this on top, are the holes spaced any differently, or do you know? They are spaced the same, aren't they?

A. The same, yes. [126]

Q. What are these little holes here for, this hole on the side?           A. Those are just nail holes.

Q. Nail holes?           A. Yes.

Q. What do you do, put them up temporarily first?

(Testimony of Morris Halopoff.)

A. Just for an adjustment, to get them in the proper place before they put the lag-bolts in.

Q. And there are similar nail holes here, aren't there?

A. Well, that doesn't make any difference, whether quarter-inch or three-sixteenths.

Q. But there are similar nail holes there?

A. Well, nail holes, yes.

Q. That's right, right adjacent to the slots.

A. Yes.

Q. Have you pointed out every difference to the Court between these two sets of hardware? Is there any other difference? A. I believe there isn't.

Q. Is there any difference in the dimensions? I believe these arms 12 are the same width, aren't they? A. Yes. [127]

\* \* \*

#### Cross-Examination

By Mr. Beehler: [148]

\* \* \*

Q. Up until about January of 1950, what kind of product were you making in your plant there?

A. Up to January, 1950, we started to manufacture, also, some standard overhead hardware.

Q. I show you a circular, Mr. Halopoff, captioned "Standard Overhead Hardware"—the caption, rather, is "Standard Jamb Hardware for Overhead Doors"—

Mr. Beehler: I request that be marked defendant's next in order.

(Testimony of Morris Halopoff.)

The Court: It may be marked for identification Defendants' Exhibit F.

The Clerk: So marked, your Honor.

(The document referred to was marked Defendants' Exhibit F for identification.)

Q. (By Mr. Beehler): Is that the standard hardware that you were making at that time? [149]

A. Yes.

Q. Does that appear to be one of your circulars?

A. It was our circular.

Q. Standard Hardware's circular?

A. Yes.

Q. You were making the Standard Jamb Hardware sets for the Standard Hardware Company, is that correct?

A. That's right.

Q. Was that the hardware that Mr. Fowler complained of as an infringement of his invention?

A. No.

Q. How long had you been manufacturing that particular hardware illustrated on the circular?

A. Approximately a year.

Q. That would be a year prior to January 1 of 1950, is that correct?

A. That's right.

Q. You had, I presume, tooling and dies, and so forth, for that kind of hardware?

A. Yes.

Q. Were they the same sort of tools and dies which you later used for the hardware which you made for Vimcar?

A. About 90 per cent of it.

Q. And that was jamb hardware?

(Testimony of Morris Halopoff.)

A. That's right. [150]

Q. What kinds of products other than garage door hardware do you now supply to Vimcar?

A. Oh, about four.

Q. Will you identify them, please, name them?

A. Nuts and bolts, washers, and also the hardware, overhead jamb hardware.

Mr. Beehler: I wish to offer in evidence the sheet just identified, or offered for identification, as Defendants' Exhibit F, as an exhibit in evidence.

The Court: It may be received and so marked.

The Clerk: So marked.

\* \* \*

### Redirect Examination

By Mr. Fulwider:

Q. I would like to ask you just a few questions about that exhibit. I won't be long. Are you still manufacturing this Standard hardware?

A. Not any more, no.

Q. When did you stop manufacturing it?

A. Oh, roughly, say about three months after.

Q. Three months after what?

A. After I got the purchase order, the first purchase [151] order from Vimcar.

Q. About three months after February 7, 1950, then? A. That's right.

Q. How long did you make this hardware prior to that time? A. Up to that time.

Q. I mean how many years prior to that had you manufactured it? A. Well, about a year.



(Testimony of Morris Halopoff.)

Q. About a year?

A. Including three months, probably a little more than a year.

Q. But you started manufacturing this about a year prior to February, 1950, is that right?

A. Yes.

Q. So you started making it about the first of February, 1949, is that correct?

A. About that.

Q. Calling your attention to this Exhibit F, the cantilever arm or link is not connected to the side rail of the door, is it?

A. That's right. [152]

\* \* \*

Q. How do you adjust a door in this type hardware to [153] get aligned vertically when you install it?

A. The door should be in a vertical position and after you get your dimensions, what the instruction calls for, from the top of the door to here, and wherever this here places itself to the door, that is where it stays.

Q. In other words, you align the door by working this pivoted end, which we will call E, the lower end of the link C, up and down on the door until everything is lined up?

A. That's right.

Q. Referring to this one here where the door is in vertical position, that link is tied down here, isn't it?

A. Somewhere near there.

Q. That is, our point E is down here, and you move that up and down the door until the whole thing is straight; right?

A. Yes.

(Testimony of Morris Halopoff.)

Q. This circular says it is for a door 7 feet to 7 feet 6. Does it say anything on here about the head room?

A. Yes, 10-inch clearance—I mean 12½-inch.

Q. Plus door thickness, is that correct?

A. I believe it is.

Mr. Fulwider: That's all, your Honor. Have you anything else?

Mr. Beehler: No. [154]

\* \* \*

### VICTOR M. CARTER

called as a witness under Rule 43b by the plaintiff, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider:

Q. Mr. Carter, you are president of the defendant Vimcar, are you not?

A. Vimcar Sales Corporation?

Q. Yes. A. Yes.

Q. You are the sole stockholder? A. Yes.

Q. Your wife is treasurer, is that correct?

A. Right. [155]

Q. The first purchase, in your deposition you stated that the first purchase of Fowler's hardware was July 12, 1949, is that correct?

A. If that is the date of record, that is correct.

Q. As far as I know, the date in your deposition is correct.

(Testimony of Victor M. Carter.)

The Court: What is that date? July what?

Mr. Fulwider: July 12, 1949, is the date when Vimcar gave its first purchase order to Fowler for Olympic hardware.

Q. In your deposition, you likewise state that the date of your last purchase from Mr. Fowler was April 28, 1950. Could you have also have made purchases in May, June, and July? Did you check the books yourself or did someone else?

A. No, I did not check them myself.

Q. Who supplied the dates for you to put in the deposition which you signed?

A. I believe Mr. Donner checked the dates.

Q. Mr. Donner checked the dates? A. Yes.

Q. And you relied on his ability when you signed it? A. Sure.

Q. I believe Mr. Beehler said yesterday that prior to your buying Fowler hardware, you sold Tavart hardware; is [156] that correct?

A. That's right.

Q. When did you start selling Tavart hardware, approximately?

A. I don't remember. I can get the date. I believe it was some time in 1947, but I am not sure.

Q. In 1947, you believe. Will you check on that date and let us have that information later?

A. Yes.

Q. When did you stop purchasing hardware from Tavart?

A. I don't remember the date, but some time

(Testimony of Victor M. Carter.)

within the period when we started buying from Mr. Fowler.

\* \* \*

Q. In 1949, did Vimcar have a catalog?

A. Yes.

Q. You always had a catalog? A. Yes.

Q. When was that catalog printed?

A. I can check the date for you. [157]

Q. Do you do it each year?

A. No exact pattern.

Q. I believe Mr. Beehler put in evidence a sheet from the 1948 catalog, and you will find out for me whether or not—well, I will ask you this question. When was the first catalog printed after 1948?

A. I will be glad to get that information.

Q. You will get that for me? A. Yes.

Q. Was the Tavart hardware sold by you under the Tavart name or under the name of Olympic?

A. I believe under the name of Tavart.

Q. You didn't start using Olympic until you started buying hardware from Fowler; correct?

A. I believe that is correct.

\* \* \*

Q. What means did you use to explain to your customers that this Olympic hardware that was made by Sturdee was different in some respects from Tavart?

A. Well, we had literature on the Olympic hardware, [158] and our salesmen took orders on the Olympic hardware instead of on Tavart.

(Testimony of Victor M. Carter.)

Q. Did you continue to sell any Tavart after you had started selling Olympic?

A. We did not buy any from Tavart, but if we had any in stock, we probably sold those.

Q. You sold what you had left? A. Yes.

Q. You don't know, then, as a matter of fact, what particular means were taken to advise the trade that you changed from Tavart style to Sturdee style?

A. I believe in our catalog we had a Tavart set in one catalog and an Olympic set in another catalog.

Q. Did you tell any of them that it was made by a different manufacturer, different source? In other words, people were familiar with the Tavart you were selling. What did you tell them about the source of Olympic, as to who made that?

Mr. Beehler: I object to that as immaterial. Whether Olympic was sold under its own name, what difference does it make?

The Court: What difference does it make whether you notified your customers or not? If you go into a service station, you don't say what kind of gasoline is this. When you ask for door hardware, you don't usually specify a certain [159] kind.

Mr. Fulwider: I would like to know, if I may, whether or not he did. If he didn't, that's all that there is to that.

The Court: What difference does it make whether he did or didn't? The customers are not complaining.

(Testimony of Victor M. Carter.)

Mr. Fulwider: Here is a change from one style hardware to another, and I just wondered, as a matter of fact, what his business practice was about letting people know.

The Court: I don't know whether it was a change from one style hardware to another. It was a change of name. It seems to me most of these sets are similar to a great extent.

Mr. Fulwider: They are all similar to the extent they accomplish the same purpose of moving a door up and down.

\* \* \*

The Court: This Standard set, is that in prior art, the Standard set?

Mr. Fulwider: Is that part of prior art?

The Court: Yes, is it prior art?

Mr. Fulwider: Not as far as the present testimony goes.

The Court: I am asking you. You know the Standard set. [160]

Mr. Fulwider: I don't know, to tell the truth. I rather think it is. Let me modify it. I don't know whether Standard made it more than a year prior, but I know that kind of stuff made by somebody else was made long prior to ours.

Mr. Beehler: According to Mr. Fowler's deposition, that was made by Mr. Fowler in 1942.

Mr. Fulwider: I was going to say that kind of hardware was sold. Whether Standard was or not, I don't know.

The Court: I have been comparing the diagram

(Testimony of Victor M. Carter.)

in Standard with the diagram in the patent, and other than making the bar in two pieces, the only thing that has been done is taking that bar, which is called 12 in your patent—I will take that back—the bar which is called 14 in your patent, which used to be attached to the door, and now it is attached to the iron.

Mr. Fulwider: The side rail.

The Court: The iron which is 13.

Mr. Fulwider: The side rail.

The Court: Yes, the side rail. That is the only thing that has been done.

Mr. Fulwider: The arm itself is different.

The Court: The arm is different?

Mr. Fulwider: Yes.

The Court: What I am trying to get at is, do you think there is anything patentable because you have taken it off the [161] door and attached it to the side rail?

Mr. Fulwider: I think the two things together, the principal novelty, of course, in this kind of hardware being the construction of the link itself, that construction and fastening it to the side rail.

The Court: Let's forget about the fact that you cut it in two and made it two pieces instead of one, and consider only for the purpose of this argument that in the Standard it was attached to the door.

Mr. Fulwider: Right.

The Court: Under the patent, you extended the side rail and attached it to the side rail.

Mr. Fulwider: Yes.

(Testimony of Victor M. Carter.)

The Court: Do you think that is patentable in itself?

Mr. Fulwider: No, we don't claim that, your Honor.

The Court: We are really coming down to this question of severing this arm and making it in two pieces instead of one. [162]

\* \* \*

The Court: All these patents were designed, or all these structures were designed for the raising and lowering of an overhead door.

Mr. Fulwider: That's right.

The Court: I assume they were all designed so as to make the raising and lowering of the door easier.

Mr. Fulwider: Yes, foolproof.

The Court: Doors are pretty heavy, and you have to work out some sort of scheme to compensate for the weight. They all do it, I presume, by a spring. Some may do it by counterbalance, but most of them are by springs, aren't they?

Mr. Fulwider: Yes. [163]

\* \* \*

The Court: One of the witnesses yesterday testified after the top had been attached to the side rail, then they compensated by a slot, and then you come along with your patent in which you attempt to cut the rod in two and compensate it in the middle rather than at the end.

Mr. Fulwider: That is correct. The Patent



(Testimony of Victor M. Carter.)

Office gave us a patent on that, and I think they are right.

The Court: We have got three steps, haven't we? The first one was the Standard step where it was nailed to the door itself.

Mr. Fulwider: Right.

The Court: Then the first improvement was to put it on the rail, attach it to the rail, make a permanent attachment to the rail. The first compensation was the slot in the free end.

Mr. Fulwider: Probably.

The Court: Then the next step was to attach it permanently at the free end and cut the bar in two and make the compensation in the middle. [165]

\* \* \*

The Court: Do you know of any case in the patent law, not related to this sort of hardware on overhead doors or garage [167] doors, but on machinery, where there is a rod or a bar and somebody decided that instead of using one bar, you could get a better result by using two bars, and they cut it in two? Can you give me any case where the courts have sustained that contention?

Mr. Fulwider: Yes, I think I can. I haven't read the Paper Bag case for some time.

The Court: I read the Paper Bag case.

Mr. Fulwider: I would like to read that case again. I lost a case on that Paper Bag case once before Judge Mathes. On the strength of that case, he held this patent, which was somewhat broader—

(Testimony of Victor M. Carter.)

I was on the other side then, for the defendant, and I lost on the strength of the Paper Bag case, but I haven't read it, as I say, for some time. It was a patent that didn't have any more novelty than this thing.

The Court: I don't know whether it is invention to take a rod or a bar or driving shaft and make it in two parts rather than in one.

Mr. Fulwider: It isn't stated that broadly, your Honor.

The Court: It does exactly the same thing. [168]

\* \* \*

#### Cross-Examination

By Mr. Beehler:

Q. Prior to the marketing by you of the Tavart garage door hardware, did you also manufacture other garage door hardware?

A. We distribute other garage door hardware.

Q. I should say distributed. They were overhead type, too?

A. Yes.

Q. Do you recall about how long it may have been before you were taking on the Tavart line that you distributed the other type?

A. I think we started some time in 1945 or 1946.

Q. After you undertook to market the Tavart type, you then changed to Fowler, according to your direct testimony. What occasioned the shift from Tavart to Fowler?

A. Well, our distribution policy didn't seem to tie in with Tavart's policy. We conflicted in some

(Testimony of Victor M. Carter.)

of the territories with their jobbers and their distributors, and they, therefore, did not want to continue selling us in the certain [171] territory. I believe in the eastern states it would not have conflicted with their sales. We preferred the Tavart set, because the customers always thought very well of the Tavart, but Tavart Company did not want to sell us any more.

Q. It wasn't your choice, then, that you had to shift from Tavart to someone else?

A. That's right, it was not.

Q. When you distributed the Fowler hardware, it was under your name of Olympic, is that correct?

A. That's right.

Q. And that was with the consent of Fowler and Sturdee at all times?           A. Definitely.

Q. You used the trade name Olympic on your whole line of products?

A. Yes, we do. We own the name Olympic. That is our trademark. [172]

\* \* \*

HARRY N. WINCHEL

called as a witness herein by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Beehler:

\* \* \*

Q. Will you tell the court your business?

(Testimony of Harry N. Winchel.)

A. Manufacturing overhead garage door hardware and building garage doors.

Q. What is your business name?

A. Winchel Manufacturing Company. [174]

Q. That is located where?

A. 116 North Pomona in Brea.

Q. How long have you been in the business of manufacturing garage door hardware?

A. I think I started in September, 1945.

Mr. Fulwider: 1945 or 1935?

The Witness: 1945.

Q. (By Mr. Beehler): When you first began the manufacture of garage door hardware, what kind did you make?

A. I made a jamb type and a track type.

Q. The jamb type was of what general description? Will you describe it for the court?

A. Well, what do you mean? Just a regular jamb type hardware.

Mr. Beehler: May I see the little red printed circular of Standard?

Q. I will show you, Mr. Winchel, Defendants' Exhibit F, which pictures a type of jamb hardware. Will you please refer to that exhibit and tell us whether or not the hardware you manufactured in 1945 corresponded in any way to that? You might use those numbers on the exhibit, if you would like to refer to something specifically in describing it.

A. Well, I have my own literature.

Q. Do you have your literature here? [175]

A. Yes. I would rather present it.

(Testimony of Harry N. Winchel.)

Q. Would you produce that for us, a copy of that literature?      A. (Witness complying.)

Q. Do you have before you a piece of your literature?      A. Yes, sir.

Q. Will you tell us when that piece of literature was printed?

A. I couldn't say as to that, no. I don't see any date on it. I couldn't say.

Q. With respect to the literature which you produced here, is that the type of hardware pictured on the literature which you were manufacturing in 1945?      A. That is correct.

The Court: Maybe we'd better have that marked for identification so we can refer to it. Mark it Defendants' Exhibit G.

The Clerk: Defendants' Exhibit G for identification, so marked.

(The document referred to was marked Defendants' Exhibit G for identification.)

Q. (By Mr. Beehler): I direct the witness' attention to the drawing of the hardware on page 3 of the exhibit and also on page 4, and call attention to the presence of a jamb plate which, if I may, I will mark with the numeral 10, and [176] an angle iron, rail plate—is that what you term it?

A. Angle iron.

Q. No. 11. A power arm 12, and a link 13—

A. Cantilever.

Q. Cantilever arm, you call it?

A. Yes, sir.

(Testimony of Harry N. Winchel.)

Q. A short piece of angle iron 14?

A. That's right.

Q. And where I draw this pencil line, which I will label 15, will you identify that part of the construction of your device?

A. That is a slot hole about, oh, I would say an inch long,  $\frac{3}{8}$  wide. This has a bolt to the cantilever arm there, jamb nut, and a nut on the other side of the bracket.

Q. What was the purpose of the slotted hole?

A. That was for a stop and for adjustment.

Q. When you say for adjustment, what adjustment was effected by use of that slot?

A. Well, that would throw—when your jambs wasn't quite even in the back, you could bring it in the width of that, and let this master arm so it would fall in that far. You see, if you put this, you would have adjustment there to let this arm swing in or out if the door wasn't the same in the back.

Q. If the jamb on the garage was a little out of [177] alignment, you mean? A. Yes, sir.

Q. Then you could push the door against the jamb by moving the end of the cantilever arm in the slot; is that correct?

A. Yes. You could put this against the door and lag screw it onto the door, and then you push this.

Q. By "this," you are referring to the rail plate?

A. The rail plate, and then you shove this C or

(Testimony of Harry N. Winchel.)

15, as you have marked it, up against this, and then lag screw this onto the door.

Q. By lag screw, you refer to the part 14?

A. Yes. That would act as a stop for the door when it was up and you wouldn't have to touch the hardware.

Q. Thank you. How long did you continue to make hardware of that variety?

A. I am still making it.

Q. Do you sell that hardware in any great quantity?

A. Well, that is a de luxe type of hardware. It isn't sold in large quantities.

Q. Did you sell any of that type hardware to Stevens and Thuet in Long Beach?

A. Yes, we have.

Q. Do you recall when you first sold that hardware to Stevens and Thuet, when that occurred, your first sale? [178]

A. No, I can't. It was back in 1945 or 1946. I can't say just exactly. They started about the same time we did and I can't pinpoint a day.

Q. Was Mr. Berger working there at that time?

A. No, he wasn't.

Q. Subsequent to your manufacture of this particular style of jamb hardware, did you then make a change to some other style of jamb type hardware?

A. Yes. We have made different changes as we have gone along.

Q. Do you have any literature which illustrates

(Testimony of Harry N. Winchel.)

what the next variety of jamb hardware was?

A. Yes.

\* \* \*

Q. (By Mr. Beehler): This, then, is a picture of [179] recent printing of the same hardware that you manufactured in 1945; is that correct?

A. Yes. That was a drawing, I imagine around, oh, I would say 1946, 1947. I had that drawn by a draftsman.

Q. A drawing from which the cut was made was drawn in 1946 or 1947?

A. Some place in there. I can't specify just the date.

Mr. Beehler: I offer in evidence, therefore, in the form identified here the exhibit referred to as Exhibit G.

The Court: It may be received and marked Exhibit G.

\* \* \*

Q. (By Mr. Beehler): Mr. Winchel, you were about to show us another piece of literature.

A. These are newer. Is this what you want? I got another one, too.

Mr. Fulwider: Do you by any chance have duplicate copies so I can have a set?

The Witness: You can have these.

Mr. Fulwider: They will need these in court here. Do you have any extras?

The Witness: No, I don't. I just brought one of each kind that I could find. [180]

Q. (By Mr. Beehler): Mr. Winchel, among



(Testimony of Harry N. Winchel.)

these pieces of literature which you have produced, will you select the piece of literature which illustrates the type of jamb hardware which you began to manufacture after you made the first change from that illustrated in the first circular that you produced?      A. After I—state that again.

Q. You showed us a circular, Defendants' Exhibit G, which showed a certain type of hardware which you manufactured, you say, in about 1945.

A. Yes, sir.

Q. Then subsequent to that you made some slightly different, but still jamb type hardware. Will you select from among the pieces of literature the one that shows that picture of the first change, let us say, that you might have made?

A. I imagine this is about our first change right there. Well, we still manufacture this type.

Q. I understand. What you are now showing me was in addition, correct?      A. Yes.

Mr. Beehler: May we have this piece of literature marked as a defendants' exhibit for identification?

The Court: It may be marked Defendants' Exhibit H for identification only. [181]

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit H for identification.)

Q. (By Mr. Beehler): I am now referring, Mr. Winchel, to Exhibit H for identification. Will you point out the features on that item of jamb hard-

(Testimony of Harry N. Winchel.)

ware which are different from the one that you described first?

A. Well, this is one piece of angle iron where the cantilever hooks on.

Q. May I label that with a number for the purpose of the record? We can call this the Alumi-Door folder. I put a number 11 on the piece you described as the single angle iron. Perhaps, if I may suggest, you had on this, also, a jamb plate 10; correct? A. That's right.

Q. And you had on this piece, also, a power arm 12; is that correct? A. That's right.

Q. And you also had on this piece a cantilever arm, or at least a section of cantilever arm 13 prime; is that correct? A. Yes.

Q. And on this particular embodiment you had a second section of cantilever arm which I will give the number 13 double prime; is that correct? [182]

A. Yes.

Q. With a pivot joint 20 between them?

A. That's right.

Q. Now, will you describe briefly the action of this type of jamb hardware?

A. That type hardware was designed for a low clearance set primarily.

Q. And by low clearance, you mean, do you not, that— A. It cut down the head room.

Q. On the head room, that is the amount of room behind the top of the front of the door at the point I mark X? A. Yes.

(Testimony of Harry N. Winchel.)

Q. That is what you mean when you say low clearance?  
A. That's right.

Q. Or clearance?  
A. Yes.

Q. Then this particular design hardware was designed to accommodate the door to a lower clearance than the first type hardware could accommodate; is that correct?  
A. Yes, that's right.

Q. Tell us, Mr. Winchel, when you first manufactured that variety of hardware.

A. Well, I couldn't say for sure. I think it was around '47.

Q. 1947, the early part of 1947, could you [183] say?

A. Well, I wouldn't say whether it was early or late.

Q. Is there anything that might suggest itself so that you could fix a date in 1947?

A. No. It was just trial and error. We accomplished this set and it never was a success, so we quit making it.

Q. But, in any event, it was in 1947?

A. I imagine it was.

Q. And you sold them commercially at that time?  
A. Not very much, no.

Q. You sold one commercially?

A. Yes. I sold a few.

Mr. Beehler: May this exhibit for identification H be received in evidence?

The Court: It may be received and marked Exhibit H in evidence.

The Clerk: So marked.

(Testimony of Harry N. Winchel.)

(The document referred to was received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Beehler): Now, Mr. Winchel, will you pick from these various illustrations you have produced another, perhaps the next change that you made in jamb type hardware?

A. You mean another set?

Q. Another set different from the two we have referred to before. [184]

A. Well, I imagine this is about the—well, this is about the same set as that other one except this was made for Butler Building. It was made for one purpose only and that was for the jamb there, you see, the tapered jamb.

Q. You are now referring to——

The Court: Let's mark that.

Q. (By Mr. Beehler): This is an instruction sheet; is that correct?

A. That is an instruction sheet for that one particular type hardware we made for Butler Building.

Mr. Beehler: May this be marked for identification then?

The Court: It may be marked for identification only as Exhibit I.

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit I for identification.)

Q. (By Mr. Beehler): Tell us, Mr. Winchel,

(Testimony of Harry N. Winchel.)

when you first made the variety of hardware pictured on Exhibit I?

A. Well, that is hard to say, too.

Q. As nearly as you can set the date.

A. It was in the latter part of 1947 and the first part of 1948.

Q. You said, did you not, that this was made and sold to Butler—what was the name of the company? [185]

A. Well, it was for Butler Buildings. We sold it to Stevens and Thuet Company.

Q. It was, in any event, sold to Stevens and Thuet? A. Yes.

Q. That was during 1947?

A. I believe that is correct. It might have been the first part of 1948.

Q. Will you describe the adjustment, if any, that is present on this type hardware in Exhibit I for identification? A. What's that, now?

Q. How that can be adjusted, if there is an adjustment for it.

A. There is an adjustment there.

Q. You are referring to the slot adjacent the point G on the drawing? A. Yes.

Q. What did that do?

A. It is adjusted there at the spring.

Q. You are referring to several holes in the upper end of the power arm?

A. Yes, and it can be adjusted down here.

Q. You are referring now to the S hook and a piece of chain? A. Yes. [186]

(Testimony of Harry N. Winchel.)

Q. With respect to the adjustment at the point G, what that accomplishes?

A. That throws the bottom of the door in or out. Well, that—on that particular hardware, that is about the only good it did.

Q. You mean then if the door were hung in the door opening, and if it were hung a little off vertical position, it could be straightened in a vertical position by manipulating the adjustment G; is that correct?

A. That is correct.

Q. That adjustment then was to plumb the door? Do I use the term correctly?

A. Well, yes, to plumb the door, you would say.

Q. One thing more. Well, may I ask this, Mr. Winchel, will you just describe briefly what a mechanic has to do when he is going to hang a garage door with this particular kind of hardware shown in Exhibit I?

A. Well, you would put your bracket on a certain distance down from the top for your action of the door.

Q. That is the bracket we have called the jamb plate?

A. Yes, the jamb plate. Then you would throw this angle iron against the door and you would have your door plumb.

Q. You are now referring to the angle iron B; is that correct? [187]

A. Yes. Then wherever that hit the door, you would bolt it there.

Q. Do you bolt it on immediately?

(Testimony of Harry N. Winchel.)

A. Well, if it is plumb and against the door, you bolt it right on.

Q. And then the next step would be what?

A. Raise it up and put your spring on.

Q. You put the spring on when the door is in raised position, horizontal position, full open position?

A. Yes, full open position.

Q. Then should you lower the door and find it not quite fitting the jamb in all respects, is it then possible to use the adjustment at G to change it slightly?

A. Very slightly on that one particular type of a door. It would be very slightly. You couldn't move it over an inch.

Q. But moving it an inch, you mean that the movement of the door would be an inch either way?

A. The bottom of the door, you could either throw it in or out.

Q. In or out an inch?           A. Yes.

Q. Would it be possible to throw it out more than an inch by making the slot G longer?

A. Well, I never tried that. I don't know. We already [188] had the bracket made and I just used that type bracket.

Mr. Beehler: I offer in evidence this Exhibit I, therefore, as Defendants' Exhibit I.

The Court: It may be received and marked Exhibit I in evidence.

The Clerk: So marked.

(The document referred to was received in evidence and marked Defendants' Exhibit I.)

(Testimony of Harry N. Winchel.)

Mr. Fulwider: There is no testimony as to when this was printed, is there?

Q. (By Mr. Beehler): Do you know when this was printed? A. No, I do not.

Q. Among the literature that remains here, Mr. Winchel, will you pick one that illustrates the next variety of jamb type hardware you manufactured which may be different from the other three we have talked about?

A. Well, it is the same type of hardware.

Q. Referring just for the moment to this piece of literature captioned "Installation Instructions for Overhead Garage Door Hardware"—

Mr. Beehler: May I suggest this be marked for identification?

The Court: It may be marked Exhibit J for identification.

The Court: J, your Honor. [189]

Q. (By Mr. Beehler): Referring in Exhibit J to the illustration identified as figure 3, which pictures a type of jamb type hardware, will you tell us about when you first began manufacture of that item?

A. You mean—I always had been manufacturing that item ever since I started.

Q. May I make this suggestion, the figure 3 of Exhibit J shows, among other things, a plate, which I will mark with a character 25. I believe that is called a gusset plate—is that the right name for it?

A. Well, I guess it is.



(Testimony of Harry N. Winchel.)

Q. Will you tell us when you first used that piece of metal on a jamb type hardware?

A. Well, that's hard to say.

Q. As nearly as you can set the date.

A. I would say in the latter part of 1948.

Q. Latter part of 1948. Were you then manufacturing that kind of hardware for commercial distribution?

A. Yes.

Q. Referring particularly to the gusset plate 25, and may I also call your attention to figure 4 in connection with figure 3, will you tell us the purpose and operation of what are apparently slots, but which I will in any event indicate by the character 26?

A. You mean the character of those? [190]

Q. What were those slots for?

A. Those slots were for adjustment.

Q. By adjustment, you mean adjustment of the verticality of the line?

A. That is correct.

Q. Do you recall or do you know how much of an adjustment you can get at the bottom of a door by manipulating that adjustment at the gusset plate?

A. No, I do not. I wouldn't say.

Q. Would it be more than the inch you mentioned in connection with one of the other pieces?

A. An inch either way is quite a bit.

Q. An inch either way is two inches in all.

A. Yes.

Q. If it were two inches in all, would that satisfy the average commercial requirement?

(Testimony of Harry N. Winchel.)

A. Well, I don't know about that. I imagine it would. We sell a lot of them.

Q. You are satisfied in any event from your point of view that it is enough?

A. The customers are satisfied, I guess.

Q. If it were necessary to adjust it to a greater extent than an inch either way, could that be accomplished by making the slots in 26 longer?

A. Well, not without making your cantilever arm [191] longer.

Q. The length of the slots then that you have chosen are about the limit that you can make with that specific length of cantilever?

A. That is correct.

Q. Did you, Mr. Winchel, sell any of this particular variety of jamb type hardware to Stevens and Thuet?

A. That is where we started. We started selling to Stevens and Thuet.

Q. Is this the first kind of hardware you sold to them, or is this a kind you sold when you first sold to Stevens and Thuet?      A. No, sir.

Q. It is not?      A. No, sir.

Q. But they are the first purchasers of your hardware of this kind; is that correct?

A. I believe they are.

Q. Do you have any records here which would indicate when the first sale was made to Stevens and Thuet of this kind of hardware?

A. No, not exactly.

(Testimony of Harry N. Winchel.)

Q. Will you give us a date as nearly as you can from your records?

A. That would be hard to say just when it was first sold. [192]

Q. Was it as early as the summer of 1948?

A. Well, I couldn't say. Just in the course of events, we kept working the hardware out and manufacturing different kinds until we hit upon this one, so I couldn't say just exactly when it was.

Q. Do you have any particular catalog number or identity for this hardware?

A. Well, we call that LO 9 type, which means it takes about 9 inches of head room.

Q. Is LO 9 used by you only for this particular kind?

A. I believe it is. The LO, I don't know if anybody else uses it.

Q. But as far as you are concerned, you don't use LO on some of the other hardware you talk about here; is that right?

A. Well, I don't know. Could I see those a minute?

Q. Surely.

A. No, we didn't call this—I guess we just give it a name when we printed the literature.

Q. Do you have the date of the printing of this particular literature in mind?      A. No.

Q. Referring again to the variety of hardware shown [193] in figure 3, do you recall when you first built that design in your plant?

A. With this gusset plate on it?

(Testimony of Harry N. Winchel.)

Q. With the gusset plate, yes.

A. No, I couldn't say just exactly when it was. We had been experimenting around for a long time.

Q. For a long time. Will you say a year, two years?

A. Oh, no, I wouldn't say that. It would be months.

Q. When you were working on this design, you mean then that it was a matter of months that you were working on a piece of jamb hardware which had a gusset plate on it?

A. Well, we keep experimenting all the time on different types of hardware and working it out by trial and error method.

Q. When you first made hardware with a gusset plate, did you put some up in your plant to try it out?

A. Well, yes, we always try it out before we put it out.

Q. Did Mr. Barnhardt help you with it?

A. Yes.

Q. Mr. Barnhardt knew, then, as well as you, about this kind of hardware when you first made it; is that correct?      A. That's right.

Q. Did Stevens and Thuet or anyone there know about [194] it before they made their first purchase?

A. Well, we sold them this other type here. Then we changed over and used this, which is about the same, except we put it on an adjustable—I mean a gusset plate there, which we had to make a differ-

(Testimony of Harry N. Winchel.)

ent design here to compensate for the adjustment. We couldn't put a narrow piece there where it took a wide piece.

Q. The change, then, from the hardware, Alumi-Door, Exhibit H, to the hardware of Exhibit J, was a change from the piece which I labeled 13 double prime to the gusset plate which I labeled 25; that is correct?

A. Except for the bracket. This is a different bracket than this one, to where we put this cantilever arm back in this hole here. Instead of having that there, we put it back there.

Q. Is that what you would call a short cantilever type?

A. Short? I don't know. It is shorter than this other type I manufacture.

Q. By the "other type" you are now referring to Exhibit G. Is there any advantage in the shorter type over the longer type?

A. It cuts down the headroom.

Q. Is there any advantage in packing if it is shorter?

A. No. They both fit in the same size [195] carton.

Q. The cutting down of the headroom is equally true of both Exhibit H and Exhibit J; is that correct? A. That's right.

The Court: Do you want Exhibit J in evidence?

Mr. Beehler: If you please.

The Court: It may be received and marked Exhibit J in evidence. [196]

(Testimony of Harry N. Winchel.)

\* \* \*

Q. (By Mr. Beehler): Mr. Winchel, were you ever charged by Mr. Fowler with patent infringement of his patent?

A. No. I don't know whether you would call it charged or not.

Q. Did he ever send you a notice of infringement?  
A. Yes, he did.

Q. You say yes, he did? A. Yes, he did.

Q. When did you receive that?

A. I don't remember.

Q. Was it a year ago, as much as a year ago?

A. Just about a year ago.

Q. When you were charged with infringement, then did you cease manufacture, or what did you do in response to that [200] charge of infringement?

Mr. Fulwider: Object to that, your Honor. I can't see that that has anything to do with this case.

The Witness: What was that again? Will you read that?

(Question read.)

The Witness: Well, we seen a lawyer and had a talk.

Q. (By Mr. Beehler): Did you continue manufacturing after that? A. Yes, we did.

Q. Are you now under a license from Fowler?

A. No, I am not.

Q. You are still manufacturing the same items

(Testimony of Harry N. Winchel.)

now that you were when you were charged with infringement?      A. Yes, sir.

Q. Do you have any understanding of any kind with Mr. Fowler about your continuing to manufacture, that you might not class as a license?

A. Well, I wasn't there at the meeting they had with the lawyer, and so forth, so I couldn't say.

Q. Who was present at the meeting?

A. My partner.

Q. His name is what?

A. Marvin Barnhardt.

Q. Who else was present?

A. The lawyers. [201]

Q. I beg your pardon?      A. The lawyers.

Q. Who were the lawyers, do you know?

A. Our lawyer was Mr. Horall of Santa Monica.

Q. He is a patent lawyer, is he?

A. Yes, sir.

Q. The other lawyers present, who were they?

A. It was Mr. Fowler's representative. I don't know.

Q. Was that Mr. Smyth?

A. Something like that.

Q. Were there any other individuals present?

A. Not that I have any recollection of.

Q. Do you know Mr. Dave Atkinson, whether he was there?      A. He might have been.

The Court: Will you tell me why this is material?

Mr. Beehler: Chiefly, your Honor, to determine—

(Testimony of Harry N. Winchel.)

The Court: I let you go ahead to establish whether or not he was a licensee and he says he is not a licensee. What difference does it make who was there and what the names of the lawyers were? Of course, there was no objection.

Mr. Fulwider: I should have objected.

The Court: I don't know why it is material.

Mr. Beehler: Well, I guess it isn't material, so I will stop. [202]

Q. (By Mr. Beehler): Tell me, Mr. Winchel, whose idea was it to slot the lever arm where the gusset plate attaches to get that adjustment?

Mr. Fulwider: May I ask what lever arm you are talking about?

Mr. Beehler: Well, we'd better refer to one of these exhibits, the last in order.

Q. As illustrated in figures 3 and 4 of Exhibit J, whose idea was it to slot the angle iron where the gusset plate attaches?

A. Attaches to what?

Q. Where the gusset plate attaches to the angle iron.

A. Well, that was worked out by trial and error method, the same as all our ideas.

Q. That was worked out by you?

A. By Mr. Barnhardt and myself.

Q. By Mr. Barnhardt and yourself in your shop? A. Yes, that's right.

Q. That, I believe you told us this morning, was in 1947 or in 1948?



(Testimony of Harry N. Winchel.)

A. I don't remember just exactly, but in 1948, I think, sometime. [203]

\* \* \*

The Clerk: Defendants' Exhibit L for identification, so marked.

(The photograph referred to was marked Defendants' Exhibit L for identification.)

Q. (By Mr. Beehler): Do you recognize that particular piece of jamb hardware as being yours?

A. Yes, that is ours.

Q. Do you recognize the installation? Do you know where that is? A. No, I don't.

Q. Can you tell from the construction of the hardware as pictured there when you manufactured it? A. No. [206]

Q. May I call your attention to the picture, pointing out that there is a gusset plate, as we have termed it, that there are slots at the connection between the gusset plate and the angle iron, and also that there is a transverse slot where the link or lever arm connects to the jamb plate? Does the fact that there is that combination of slots on the piece of jamb hardware suggest anything to you about when you may have made it?

A. The only one that would be different is this here with this triangular piece.

Q. Do you recall having manufactured a piece such as this where there was a slot at both ends of the link connection? A. Yes, I remember.

Q. Do you remember about when that was?

(Testimony of Harry N. Winchel.)

A. Well, it could be any time from the latter part of 1948 to the middle of 1948, I don't know, to the present time.

Q. Did you make a piece of jamb hardware like that in the middle of 1948?

A. Well, I couldn't say whether it was the middle or the end. I would say it was around 1948 some place, the first of 1949. I don't know just offhand.

Q. Do you recall having sold pieces of that particular kind to Stevens and Thuet? [207]

A. Oh, yes. We sell lots to them.

Mr. Beehler: I will leave this as an exhibit for identification until we can identify it further.

\* \* \*

### Cross-Examination

By Mr. Fulwider:

Q. Mr. Winchel, calling your attention to the first [208] folder that you discussed, Exhibit G, which shows a little horizontal slot here at C, as I understand it, the function of the bolt which is in the slot is to act as a stop for this power arm, is it not? A. Stop for that, yes.

Q. And you can adjust the bolt, thereby adjusting the stopping position? A. That's right.

Q. Do you call that a door stop?

A. Well, we call that a stop or adjustment. I don't know which you call it.

Q. That is its main function, as I understand it.

A. The main function?

(Testimony of Harry N. Winchel.)

Q. Yes, of the bolt there, is to act as a stop for that arm.      A. An adjustment, yes.

Q. In this type hardware where the end 14 is not connected to the side plate 11, the way the door is positioned for vertical alignment is to line up the door and then nail or bolt this bracket 14 in place, is it not?      A. That's right.

Q. And then once that is bolted in place, no further substantial adjustment of the door in the vertical angle can be made, if I understand correct?

A. There can be a little adjustment there, not much. [209] You can move this back and forth there just in that little slot and get a little adjustment.

Q. By moving the bolt and slot C, you get a little adjustment, although actually that is almost a horizontal movement, isn't it?      A. Yes.

Q. At the upper end there?      A. Yes.

Q. This being fastened to the door and this rod 13 is pivoted at 14, is it not?      A. Yes.

Q. As I understand it, you started making this hardware, your de luxe, Exhibit G, in 1945. That was your first hardware, wasn't it, in 1945?

A. Yes, sir.

Q. And you are still manufacturing and selling some?      A. That's right.

Q. Have you ever run any experiments to see just how much of an adjustment you can get with this little horizontal slot at C? You say an inch. I am wondering if you have ever actually tried it out to see if you get as much as an inch even.

(Testimony of Harry N. Winchel.)

A. Well, just on the doors we have had hung. You mean to throw the bottom of the door or the top of the door?

Q. Yes, to throw the angle of the door, to throw the [210] bottom or the top.

A. I guess you get about an inch.

Q. Now, referring to Exhibit H, which is the Alumi-Door, I think you said that you made that, you thought, in 1947 first. Could it possibly have been in 1948 when you first made it?

A. Well, I don't know the exact date of the manufacturing of it.

Q. It could be either 1947 or 1948, as far as you now recall?

A. Well, it could be; yes, sir.

Q. I believe you said in this particular one that this wasn't particularly successful. Can you tell me just very briefly why it wasn't successful?

A. Well, this little piece there was welded. We had to weld that.

Q. That is the 13 double prime?

A. It had to be welded in just the exact position.

Q. Welded to the bar C?

A. Yes.

Q. Which is also called 11?

A. Yes.

Q. So that the only pivot in these arms there between rail 11, arm 13 double prime, and arm 13 single prime, was the single pivot 20? [211]

A. Yes.

Q. What bad effects did you get by reason of having it welded? You say it had to be located very carefully?

A. Yes, it had to be—well, sometimes—

(Testimony of Harry N. Winchel.)

Q. You didn't have any adjustment here, did you?      A. No.

Q. There is no slot in this D, is there, in this form?      A. B?

Q. Yes, B.      A. No.

Q. And no slot at C down near the bottom?

A. No.

Q. Referring to the next one, I, that is, I believe, the ones you made up for Butler Houses?

A. Butler Buildings.

Q. I believe there you said that you thought you made that up in 1947 or 1948. Could that possibly just as well have been 1948 or 1949?

A. No, I think it was before 1949.

Q. You think it was before. This has a horizontal slot, doesn't it?      A. Yes.

Q. A little horizontal slot at G?

A. Yes. [212]

Q. No slot, however, down at the bottom of this L-shaped link arm, is there?

A. That bracket and this bracket is the same one.

Q. On J, the LO 9, that is your today's product sold for low head space requirements, isn't it?

A. That's right.

Q. I think you said that was manufactured first in 1948. Could it have been the early part of 1949 as well as 1948? I mean, are you sure enough to say one way or the other?

A. Well, I am not—I can't specify a certain date.

(Testimony of Harry N. Winchel.)

Q. That is, you are not certain?

A. No. I think it was in 1948. [213]

\* \* \*

Q. Did you find that your customers have any easier [214] job assembling that type where the cantilever arm is fastened to the angle, side plate? I mean, are they any easier to install?

A. No, I don't think so. [215]

\* \* \*

Q. Would you want to give the judge a little idea of the modus operandi, in other words, the system you employ in working out these changes?

A. Well, it is all by the trial and error method. You hold up a set of hardware and change this and change that, and you have to keep working at it until you hit on the right idea. You think it out at night and then come back and work at it the next day. It is all by guess and everything else. [216]

\* \* \*

### JOHN KING McFADDEN

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

\* \* \*

#### Direct Examination

By Mr. Beehler:

Q. Mr. McFadden, what is the name of your present business?

(Testimony of John King McFadden.)

A. King Overhead Door Hardware and Tool Company.

Q. You are the sole proprietor of that business, are you?      A. I have a partner.

Q. Your partner's name is what?

A. Pete Novotny.

Q. How long have you been in the business of manufacturing overhead door hardware?

A. Oh, since the last part of 1947.

Q. Were you connected at all with the overhead door hardware business prior to that time other than as a manufacturer? [218]      A. One time.

Q. Your answer is what?      A. One time.

Q. What was that occasion?

A. I worked for Sturdee Steel for about three months, approximately, in 1946.

Q. About what part of 1946 was that, as nearly as you recall?      A. I can't remember.

Q. What did you do at the Sturdee Company in 1946 when you were there?

A. I helped work out some ideas on overhead door hardware.

Q. What kind of hardware was that, specifically?      A. Low clearance, jamb type.

Q. What was it that you did in connection with that hardware? Did you change it or add to it or reconstruct it? Will you please tell us?

A. I used some of my ideas in changing it from the way it had been constructed. The set had already been worked out, but I added some changes to it.

(Testimony of John King McFadden.)

Q. What was it that you added to it?

A. Simplifying it.

Q. At the time, Mr. McFadden, you began the manufacture of jamb type overhead hardware, will you describe the item [219] that you manufactured at that time?

A. Well, it would be hard to describe in just a minute.

Mr. Beehler: May I have this paper marked for identification?

The Court: It may be marked for identification only, Exhibit M.

The Clerk: So marked, Defendants' Exhibit M.

(The document referred to was marked Defendants' Exhibit M for identification.)

Q. (By Mr. Beehler): Mr. McFadden, you recognize this piece of paper as your instruction sheet, I believe?

A. Yes, that's it.

Q. I call this to your attention now solely for the purpose of aiding you in describing the kind of hardware that you were manufacturing in 1947 when you began in business, so will you describe the several parts?

A. This is the type I manufactured in 1947. That is one type of hardware I put out.

Q. When you say this is the type, you refer to the drawing on Exhibit M for identification?

A. Yes, that is one type I put out.

Q. Now let's take it piece by piece. In 1947, the jamb plate, which I will mark 10, how was that constructed?

A. Exactly like that.



(Testimony of John King McFadden.)

Q. In 1947, the power arm, which I number 11, how was [220] that constructed?

A. Exactly the same as that.

Q. The angle iron, which I now number 12, how was that constructed?

A. The same as that.

Q. I draw another reference character 13 with a line to another piece of angle. How was that made?

A. Exactly like that in 1947.

Q. I now draw an arrow to the spring arrangement, which I will label 14.

A. Just exactly like that.

Q. Was the kicker plate, too, as pictured here? I will identify that with a character 15.

A. The only change in the kicker plate was we added one more hole to this adjustment right here later. This only had four holes right there, but the later ones had five.

Q. This exhibit shows four holes.

A. It has four and one up in the corner, see. The later ones had five right here and one in the corner. That's all the difference. It made a little bit finer adjustment.

Q. After you had manufactured those pieces of jamb hardware of that description, did you or did you not make some changes in it?

A. Yes. I have continued to make changes in it ever since I made it. [221]

Q. What was the first change you made in the hardware of your manufacture?

A. I have changed this arm on some of these sets.

(Testimony of John King McFadden.)

Q. When you say "this arm," you refer to the——

A. Cantilever arm.

Q. The cantilever arm?           A. Yes.

Q. May I mark this, which I failed to do before, with the character 16? How did you change the cantilever arm?

A. I fastened it at the angle right here.

Q. You fastened it to the angle which we have labeled 12?           A. Yes.

Q. Did you have to make an angle any longer in order to fasten it?           A. No.

Q. When you fastened it to the angle, did you then dispense with the little angle 13?

A. I still build this set exactly as it is, only I have made changes in the other sets. I build a number of different kinds of hardware. I have built a hundred different kinds of hardware.

Q. Referring to the other set, Mr. McFadden, I was merely asking you if when you used that single angle iron in that set, you left this little angle iron piece off? [222] I believe you did; is that correct?

A. I still manufacture this set exactly like this. Some of the hardware has this arm fastened to the angle at the present time.

Q. Do you recall when you first manufactured a set where you did fasten the cantilever directly to the angle 12?           A. 1947.

Q. In 1947?

A. Yes. I started them both at the same time.

(Testimony of John King McFadden.)

The low clearance had to have it fastened to the angle iron and standard hardware didn't.

Q. When you manufactured that particular style of hardware wherein the cantilever was attached directly to the angle iron, did you or did you not have any means of adjusting the position of the door when it was fastened on? A. Yes.

Q. How did you do that?

A. You mean when this cantilever arm was fastened to the angle, the adjustment that I used?

Q. Yes.

A. An arm down here and an arm over here in a slot, so that by moving this in the slot, it moved this arm forward and back for making adjustments.

Q. For the sake of the record, may I give you a sheet of paper, Mr. McFadden? [223]

A. It would be very easy to see just exactly what I mean if the hardware set is over there that I seen yesterday. There is one of my sets over there.

Q. We have a piece of your hardware?

A. Yes. Then I could show you exactly what I mean.

Q. I will be glad to produce it.

The Court: We might have that marked for identification. Mark it Exhibit N for identification.

The Clerk: So marked, Exhibit N.

(The article referred to was marked Defendants' Exhibit N for identification.)

Q. (By Mr. Beehler): Mr. McFadden, I show

(Testimony of John King McFadden.)

you Exhibit N for identification, a physical exhibit, and I ask you if this is a piece of hardware which you just asked us to produce?      A. That's it.

Q. This is a piece of hardware of your manufacture?      A. That's it.

Q. Now, Mr. McFadden, will you explain with relation to this piece of hardware——

The Court: Suppose you set it up here where we can see it.

Q. (By Mr. Beehler): ——the adjustment you had reference to?

A. Right here is the adjustment I had reference to.

Mr. Beehler: The witness points to the end of the [224] angle iron to which is attached a short length which is a part of the cantilever arm. Am I correct?      A. That's right.

Q. Will you explain what happens, what is the effect of shifting this bolt and that end of the link in the slot in the angle iron?

A. You set the door in vertical position, if it is in place.

Q. If it is out of position, you can shift it with that adjustment; is that correct?

A. Yes, to a vertical position with that adjustment.

Q. You stated, I believe, the first time you made that kind of an adjustment was in 1947; is that correct?      A. 1947.

Q. Do you have any literature of your own which was printed about that time which you could

(Testimony of John King McFadden.)

produce so that we wouldn't need this physical exhibit in the record?      A. I haven't any with me.

Q. Do you have some?

A. No, I have none of that exact cut. I have none of that. I have never had a picture taken of that hardware. Maybe just a photo of it. I never had any literature made with that drawing.

Q. Do you have any literature that would show this kind [225] of an adjustment in any piece of jamb hardware that might be otherwise a little different from this?      A. No.

Q. Do you still have in your possession any pieces of the actual hardware that you manufactured, that you made in 1947?

A. I am still making it.

Q. But do you still have any piece you made then that you saved, since 1947?

A. No doubt there is some there. I wouldn't say exactly. There might be some of it, but it is exactly the same as I am making now.

Q. Exactly the same with respect to all dimensions, you mean?

A. Yes. This hardware that was made in 1947 is being made at the present time.

Q. You are now referring to Exhibit M for identification?

A. And the same instruction sheet. It has never had to be changed. It was so near that the instruction sheet has never had to be changed.

Q. With respect to the hardware, Exhibit N, does the same statement apply?

(Testimony of John King McFadden.)

A. The same instruction applies to this as to this, the same measurement fits it, so I have never had to make an [226] instruction sheet for that.

Mr. Beehler: I would like to offer in evidence as Exhibit M the instruction sheet previously identified.

The Court: It may be received and marked Exhibit M.

\* \* \*

Mr. Beehler: That is correct. I wish to offer in evidence this physical exhibit, Exhibit N, as exemplifying the hardware of Mr. McFadden as it was produced in 1947.

The Court: It may be received and marked Exhibit N.

The Clerk: So marked.

(The article referred to was received in evidence and marked Defendants' Exhibit N.)

Q. (By Mr. Beehler): Did you know, Mr. McFadden, Mr. Earl Murphy?

A. Yes, sir; I knew him.

Q. Did Mr. Earl Murphy ever work with you?

A. I have worked in the same shop with him.

Q. He was not with you in business, you mean, is that it? A. No. [227]

Q. Did you and Mr. Earl Murphy ever work together on any jamb type hardware?

A. He worked on jamb type hardware in my shop. I might have given him a few suggestions, or something to that effect.

(Testimony of John King McFadden.)

Q. Do you recall when that was?

A. About 1947.

Q. Do you know what Mr. Murphy did when he left your shop?

A. I understood that he started manufacturing hardware.

Q. When did he leave your shop?

A. Well, I would say in 1948, although he wasn't there steady at any time.

Q. Did you ever know that Mr. Earl Murphy worked for Mr. Fowler, the plaintiff here?

A. Yes. I worked for Mr. Fowler at the same time Murphy did.

Q. And that was in 1947, I believe you told us, or 1946?

A. I believe it was 1946.

Q. When Mr. Earl Murphy worked in Mr. Fowler's shop, did he work on jamb type hardware?

A. Some of the time.

Q. Tell us, Mr. McFadden, when you were in the shop with Mr. Fowler in 1946, what kinds of hardware did he have [228] then in his shop?

A. You mean the kind he was manufacturing?

Q. Yes. A. Jamb type.

Q. Did it resemble the jamb type of the circular you showed us here or the jamb type of the exhibit that you have in front of you now, Exhibit N?

A. It was more on the type of things of my instruction sheet, but it was not exact in any way.

Q. Did not Mr. Fowler manufacture what he called a lo-head type of hardware in 1946?

A. Yes, he manufactured the lo-head in 1946.

(Testimony of John King McFadden.)

Mr. Beehler: May I have this Patent No. 2523203 marked for identification, to Fowler, et al.?

The Court: It may be so marked, Exhibit O.

The Clerk: So marked.

(The document referred to was marked Defendants' Exhibit O for identification.)

Q. (By Mr. Beehler): When you were in the shop in 1946, the Fowler shop, did you see any jamb type hardware there which looked like the drawing in this patent, Exhibit O for identification?

A. Yes, sir. This looked very much like that.

Q. You pointed to figure 2. Did that appear to be like the hardware that you were called in to work on? [229]

A. I worked on that hardware while I was there. I made some changes in it.

Q. What changes did you make, Mr. McFadden?

A. This arm.

Q. You are referring to No. 14?

A. As it was then, when the door was up in this position, it had to cross the jamb, part way across the jamb.

Q. And this is the jamb?

A. This is the jamb right here. I put a bend in this arm and brought it back here where it never had to cross the jamb, because sometimes it would make a mark on the jamb where it crossed. I brought this arm back and lengthened this one.

Q. By "this one," you refer to 15?

A. It gave it the same action, but didn't put this arm across the jamb.



(Testimony of John King McFadden.)

Q. And did the piece of hardware that you were experimenting with at that time have an adjustment in the middle of the arm 15 like is shown there? A. Yes, sir.

Q. What was the purpose of that adjustment, do you know?

A. To set the door in a vertical position when it was closed.

Q. Did you complete a set of that hardware while you were there? [230]

A. It was completed and put on the market while I was there, that is, they had it on the market before, but it was still on the market when I left with the improvements in it.

Q. And you left Fowler about what time?

A. I don't remember the exact dates. I was only there not to exceed three months.

Q. That was within the year 1946 then?

A. Yes, it was.

Q. In any event, it was not later than 1947?

A. No, it couldn't have been.

Mr. Beehler: I wish to offer this Exhibit O in evidence.

\* \* \*

Q. (By Mr. Beehler): Did you, Mr. McFadden, ever sell your jamb type hardware where the hardware was made with a single angle iron to Stevens-Thuet?

A. I have sold Stevens-Thuet a number of sets. I don't recall all the different models.

(Testimony of John King McFadden.)

Q. Did you ever sell your hardware to Coffey Overhead Door Company?

A. Yes, I have sold him some hardware at different times, different styles.

Q. Do you recall when you first sold to [231] Stevens-Thuet?

A. No, I cannot give you the date.

Q. Could you give us an approximate date?

A. 1948 or 1949.

Q. How about with respect to Coffey, can you give us the date when you first sold to him?

A. Not closer than to say 1948 or 1949.

Q. To whom did you sell your jamb type hardware of the kind of Exhibit N in 1947?

Mr. Fulwider: May I have the question, please?

The Court: Will you read the question, please?

(Question read.)

The Witness: To Door Hangers.

Q. (By Mr. Beehler): Do your records show how many of those items you sold during the year 1947? A. I am not positive that they do.

Q. Can you give us an approximate idea here without referring to your records?

A. This type of hardware right here?

Q. Yes.

A. There were very few of that type sold.

Q. In 1947? A. In 1947.

Q. The other type hardware, about how much?

A. I can't even guess at it without looking [232] it up.

(Testimony of John King McFadden.)

The Court: Before we proceed with the testimony, I wonder if I could ask a question? I understand from this witness that the structure as depicted in Exhibit O was made somewhere back in 1947. Is that correct?

Mr. Fulwider: I think there is some confusion in his testimony as to what was made and what was not.

The Court: I am asking, isn't that what this witness testified?

Mr. Fulwider: As I understood it, he said there was such a structure in existence in the shop.

The Court: Let's assume just for a moment that there was such a structure and he worked upon it and it was sold. I notice now the patent wasn't granted until 1950. It was filed in 1946.

Mr. Fulwider: That's right, your Honor.

The Court: Is there any question here about this being prior art?

Mr. Fulwider: Yes. It is not prior art.

The Court: What's that?

Mr. Fulwider: It is not prior art. [233]

The Court: What do you say?

Mr. Beehler: Yes, there is a question of it being prior art.

The Court: Do you say it is?

Mr. Beehler: I say technically it is not prior art. It can, however, be used to show a state of art to determine whether or not there is invention present in the device in suit. It was also used for

(Testimony of John King McFadden.)

illustrative purposes to assist this witness in pointing out what he did in 1946.

The Court: I notice in Exhibit O that the various bars were made in two pieces, that is, they were bolted in the middle.

Mr. Fulwider: That's right, your Honor, in this experiment. You see, this patent didn't issue until after the other one, I think.

The Court: Then the truth of the matter is back in 1947 there was some work being done upon these bars that had been made in two pieces instead of one.

Mr. Fulwider: Mr. Fowler was working on this all the way along the line, and he filed these two separate kinds. He had experimental models and then he changed. As I understand it, there were actually bars he was playing around with.

The Court: May I ask this witness a question?

Mr. Fulwider: Yes. I wish you would, to clear it up.

The Court: I want to refer you to Exhibit O and call [234] your attention to the fact that the bars No. 15 and No. 12 seem to be in two pieces, bolted in the middle.

The Witness: This is bolted in the middle.

The Court: That is, 15 was bolted in the middle?

The Witness: Yes, and there was two sets of holes there, one adjustment for a 7-foot door and one for an 8-foot door, but that was all.

The Court: How about 12?

(Testimony of John King McFadden.)

The Witness: This one had two holes in it, one for the 7 and one for the 8.

The Court: When you went to work for Mr. Fowler, was the structure in that kind of condition, that is, two bars here and two pieces, or is that something that developed while you worked there?

The Witness: That is something that was there.

The Court: Already there?

The Witness: To make the adjustment for the 7 and 8-foot doors.

The Court: Do you know whether or not that structure was ever made and sold?

The Witness: Yes, it was made and sold.

The Court: You are sure of that, are you?

The Witness: Yes, sir.

The Court: On the market?

The Witness: Yes, sir. [235]

The Court: It was not for experimental purposes only?

The Witness: This set was made and sold.

The Court: In 1947?

The Witness: Yes, sir.

The Court: All right.

Mr. Fulwider: I am thoroughly crossed up, your Honor. That is contrary to all my information.

The Court: Then what am I supposed to be if you are crossed up?

Mr. Fulwider: I would like to go through it with this witness element by element, maybe, because it is contrary to my understanding.

(Testimony of John King McFadden.)

The Court: All right.

Mr. Fulwider: As I understand it, Fowler and his associates, his employees, had always been experimenting since he started, and this structure, of course, was filed on in 1946. I think it was in existence at the time he filed the application. The question is the sale. I would like to ask him about that, because I don't think that is correct.

The Court: The thing that is important here, as I understand it, from what has gone on, is whether or not there is invention in that bar 15 or arm 15, where you make it in two pieces rather than one. Here is a witness who testifies back in 1947 here was a structure that was made and sold, and it shows that the bars were made in two pieces instead of one. [236] It seems to me there is your lawsuit.

Mr. Fulwider: I think you are right. If an arm as shown in the other case that functions was sold, it would certainly be a public sale. Mr. Smythe calls my attention to the function of that thing, and that this arm was of the old style type, positioned out at the end, so that adjustment was not had in this manner.

The Court: It is true in Exhibit O, in the structure in Exhibit O, you use three bars, and in your patent, Exhibit 1, you only use two bars, but the thing I am interested in, you take bar 15 in Exhibit O, and there is a division in the center of the bar in order to make the adjustment. He says to make an adjustment for 7 and 8-foot doors. What

(Testimony of John King McFadden.)

difference does it make whether it makes an adjustment in feet or in inches?

Mr. Fulwider: I think it makes this difference. As to the theory, the operation is different. If this bar link 15 is or operates in the old style apart from this plate, then the function played by any adjustability here is entirely different. It is not for that purpose. It doesn't function that way. As I understand it, it was never sold. If any were sold, and I am not persuaded there were, but assuming there were, they would be of this kind where this link 15 is a part of this, and this particular invention we have got here is limited to that feature. In other words, adjustability here [237] is purely academic unless you tie this to this.

The Court: You are giving me an argument as to what the result will be. All I have is the picture, and I think I can see. Some people doubt sometimes whether I can see, but I think I can see. This witness says he can explain it.

The Witness: I believe you have a misunderstanding, your Honor.

The Court: Fine. Then you can straighten me out.

The Witness: This arm has to be approximately three inches longer than on the 7 feet. This adjustment—

The Court: You are referring to 15?

The Witness: Yes. That was put in there for that purpose, but not to make a vertical adjustment on the door. This has nothing to do with making vertical adjustment on the door.

(Testimony of John King McFadden.)

The Court: Where did you make your vertical adjustment on the door?

The Witness: Where you put this on the door right here makes your vertical adjustment. It has nothing to do with this part at all. This is where you make your vertical adjustment right here, because where you put that on——

The Court: Although the purpose was to make that applicable to either a 7 or 8-foot door, nevertheless, the fact is that that bar was separated at the middle and bolted together with bolts so that the adjustment could be made? [238]

The Witness: There was no adjustment there, your Honor. It was only round holes. There was no adjustments. The adjustment had to be made here.

The Court: Isn't it true you have got two bars here and one goes in the other and they are bolted together? Isn't that what the picture shows?

The Witness: They are bolted together, but not in a slot. They had to be put in a set position each time they were put together. There was no adjustment in this arm.

The Court: But the fact of the matter is there were two pieces here instead of one.

The Witness: They were bolted together, but no adjustment in the center. [239]



(Testimony of John King McFadden.)

Cross-Examination

By Mr. Fulwider:

Q. As I understand it, Mr. McFadden, what you are explaining to us a moment ago was that this arm 15b and this arm 15a each had a series of holes in them and the holes overlapped so that you could vary the length of it by overlapping and sticking the bolts through different holes. Was that what you said? That is the way I understood it. That you didn't have slots here like these dotted lines.

A. There was no slots.

Q. So that the ones you were talking about didn't have slots? [243]

A. That's right.

Q. Here is one has a series of holes and here is the other one with a series of holes, and you take your pick, and you use any two holes; is that correct?

A. That's right. The arm was the same as a solid arm. The only difference was to get the difference in length for 7 and 8-foot hardware.

Q. Am I also correct in this understanding of what you said, that the choice of any pair of holes here didn't affect the adjustment of the door?

A. Not in any way.

Q. The door was adjusted by moving this thing back and forth?

A. That is the only adjustment.

Q. And once you got that anchored, that would do it?

A. That is correct.

The Court: May I break in again?

Mr. Fulwider: Yes.

(Testimony of John King McFadden.)

The Court: You have had the witness to say that was not slotted.

Mr. Fulwider: Yes.

The Court: What are you going to do about your patent which says it is slotted?

Mr. Fulwider: It is slotted in there. That is why I brought that out. You see, without examining it, he said [244] what was sold was covered by the patent, and I was quite sure what was sold was not the same. The patent shows some slots for general easier adjustment, and I think what was actually sold was a series of holes. The effect is the same. It is a question of how much or how little. But that isn't the important point. The important point is what we were discussing a minute ago.

I would like to have marked for identification a photo which I think will tend to clear this up that was made of some hardware that was made about the same time.

\* \* \*

Q. (By Mr. Fulwider): I show you, Mr. McFadden, a photograph, Exhibit 23 for identification. Can you tell me whether or not you ever saw any hardware like that in Mr. Fowler's establishment while you were there?      A. Yes, sir.

Q. Did you have anything to do with the development of that?      A. Yes, sir.

Q. Would you explain to the court what you did and how this grew out of what? I think that is the best way. [245]

A. They had this hardware in this form——

(Testimony of John King McFadden.)

The Court: Speak up so we can all hear you.

The Witness: They had this hardware in this form, except this arm was straight and it had to cross the jamb when the door was open, and it would sometimes mark the jamb. So I bent this arm like this so that it never went forward far enough to cross the jamb. By linking this other arm, it made up for it. That was one of the changes that I made in the hardware.

Q. (By Mr. Fulwider): That is called, I believe, the boomerang type.

A. I believe that is what they named the boomerang.

Q. Can you compare, if it means anything, and I think it does, compare this boomerang, Exhibit 23, with the hardware shown here? Did one grow out of the other or are they connected?

A. This one grew out of that.

Q. That is, the boomerang 23 grew out of this?

A. That is correct.

Q. This boomerang—well, that doesn't show the other end. Do you remember whether the end of the link—let's see if I can see it. Do you remember what the end of this link adjustment hooked onto? Was it on this side rail or was it down below, as shown in the patent?

A. It was down below like this. [246]

Q. As shown in the patent? A. Yes.

Q. Were any of these sold, Exhibit 23?

A. Yes, sir, they were sold.

Mr. Fulwider: I think that tends to clarify it a

(Testimony of John King McFadden.)

little bit, your Honor. We probably won't get it completely verified until Mr. Fowler explains all the odds and ends.

Q. Do you think of anything else, Mr. McFadden, that would tend to shed light on this situation?

A. Well, getting back to the adjustable arm, I can show you the advantages the adjustable arm has over this type, if that is necessary.

Q. What was that? I didn't catch it.

A. I can show the advantages of the adjustable arm over this type.

Q. All right. Would you do that, please? Maybe that would help us.

A. When the hardware is in the up position, when we have to change this adjustment here to make the door fit properly when it is closed, then in the up position, it will either—it tends to tip the door out too far, or in the other way, maybe it will tip it in like this, because we are moving this arm forward and back. In the adjustment here, in the arm itself, it don't have that effect. I have tried it both ways. [247]

Q. If I understand you correctly, when you say the adjustment here in the arm, you mean a slotted arm like is being used in the Sturdee structure?

A. The slotted arm will not have the effect of tipping the door out too far or in too far when it is in the open position, which this does have that effect.

Q. Let me see. How much can you get of this bolt loose? Well, I will ask you the question. In

(Testimony of John King McFadden.)

moving the bolt in the slot in the lower end of the side rail from one extreme position to the other, thereby rocking about this center arm as a pivot, do you get a large or a small motion?

A. Set the door by moving that adjustment and the door is in the closed position like——

Q. Can I help you?

A. This is the way it is in the closed position. By moving this arm, I can set that in an inch or I can set it back an inch, which gives you all the adjustment that is necessary, vertical adjustment in the door.

Q. Have we got a wrench? I wonder if we can put this down on its side and demonstrate it.

A. I have one.

Q. Good. You come completely equipped?

A. I always have them in my pocket.

Q. Do you think if you laid it down like it was and then shoved it back and forth, we might take a look and see [248] how much movement there is.

A. (Witness demonstrating.)

That adjustment is now at the end.

Q. It is clear at the lower end?

A. Now, with the door closed, you see that sets in here approximately one inch because this is the jamb. That adjustment sets it in an inch, and when we set it in the other end of the slot, it is like this (indicating). It fits in back. That isn't quite the end of the slot there.

The Court: Well, that's all right. I can see what you are getting at.

(Testimony of John King McFadden.)

Q. (By Mr. Fulwider): As you move this arm——

A. It changes to vertical position, the door, you see.

The Court: Is that your structure?

The Witness: Yes, sir.

The Court: Why didn't you ever use the slotted arm? You knew of the slotted arm door.

The Witness: Not at the time I made this, I did not know of the slotted arm.

The Court: After you made it, you knew of the slotted arm?

The Witness: Well, by the time I looked into it and decided to use it, I inquired and they told me Roscoe had a patent applied for on it and I didn't go into it. [249]

The Court: But in your opinion the slotted arm is the best?

The Witness: It is the best there is, no doubt in my mind about it. If I could use it, I would.

Mr. Fulwider: I think we have about covered it, haven't we, your Honor? Perhaps we will have to digest all the testimony a little bit, but I think we have covered it.

The Witness: You see, the adjustment is here.

The Court: Yes, I know what it is. All right.

Q. (By Mr. Fulwider): I might ask you one question. I think you said this. I am not sure. In your opinion, is this type of hardware where you tie the link in the side rail, does it have any advantages over that type shown in the patent we were

(Testimony of John King McFadden.)

talking about a minute ago, where you tie it down here? In other words, tying the link to the one side rail instead of having to have it on a separate side rail?       A. You mean tie this link to the angle?

Q. Yes.

A. It simplifies the installation of the door. [250]

\* \* \*

ROSCOE FOWLER

called as a witness by the defendants under Rule 49b, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Beehler: [252]

\* \* \*

Q. Maybe if we start with the time when you made it commercially, we can work back from there. Mr. Fowler, when was it that you made the first commercial sale, the first public sale, of the structure like the patent in suit?

A. February, March, I believe, of 1949.

Q. To whom did you make the first sale?

A. I don't know.

Q. Did you make it to Vimcar?       A. No.

Q. How long before you made the first sale did you [253] have your tooling and your dies complete to make it?       A. Before I made the first sale?

Q. Yes.

A. I wouldn't know that.

(Testimony of Roscoe Fowler.)

Q. You would have drawings prepared, would you not, for the fabrication of that?

A. I did not have.

Q. How did your workmen know how to make it?

A. They worked from parts, the developed parts.

Q. Did you have drawings for the parts?

A. No.

Q. How did your workmen know how to make the parts?      A. I made the parts.

Q. How did you know how to make the parts without drawings?

A. Trial and error method.

Q. All the production of this device——

A. I did not hear you.

Q. Is all the commercial production of this device, the patent in suit, made without any drawings?

A. There is a drawing, but where it came from, I don't know.

Q. Where is the drawing?

A. I don't know that, either. [254]

Q. How do you know there is a drawing, if you don't know where it is?

A. I seen the drawing. We found the drawing.

Q. Where was it when you saw it last?

A. In my office.

Q. When was that?

A. I don't know. A month ago.

Q. Where is it now?      A. I don't know.

Q. How long did you say it took to tool up and make this device commercially?

A. How long it took to tool up for it?



(Testimony of Roscoe Fowler.)

Q. Yes.

A. Well, we made temporary tooling to start with. I would say it took approximately a year to complete the tooling in our plant.

Q. Are you saying, then, that you made the first one of these devices experimentally a year before the first commercial sale?

A. No, I didn't say that. I said we used temporary tooling to start with.

Q. How long did it take to get that together?

A. The temporary tooling?

Q. Yes.

A. Oh, a month, two months, maybe a [255] month.

Q. That would be a month before your first sale that you made the temporary tooling then, if I follow you?      A. About that.

Q. What was the temporary tooling made from? Your first model, your first experimental model?

A. That's right.

Q. Then I take it your first experimental model was completed about a month before your first commercial sale? Do you follow me there?

A. By first tooling—tell me that again, will you?

Mr. Beehler: Will you read the question, please?

(Question read.)

The Witness: Well, that isn't exactly right, because there were several experimental models before we arrived at what we wanted.

Q. (By Mr. Beehler): Do you still have them?

(Testimony of Roscoe Fowler.)

A. No.

Q. When was the first experimental model completed?

A. For this particular set of hardware?

Q. Yes. A. I wouldn't know—this——

Q. How many—excuse me?

A. It develops from time to time. I couldn't tell when we started or exactly when we finished it. The chances [256] are before we got the tooling finished, we made some changes in the set.

Q. There was some date, though, was there not, when the device was all put together and hung on a wall and it worked?

A. I wouldn't attempt to state a date. There are many, many ways that a set of hardware will work, but the final set, the way we manufacture it now, I couldn't say when we finished it.

Q. Mr. Fowler, is it your contention that the gusset plate, which is identified by the reference character 16, the use of the gusset plate on jamb type hardware, is a part of your invention?

A. You are familiar, are you not, Mr. Fowler, with Tavart hardware? A. Yes, sir.

Q. You knew about the Tavart hardware before you produced your own hardware commercially?

A. I did.

Q. How long before?

A. I knew about Tavart hardware, I believe, in 1946 or 1945.

Q. How was the Tavart hardware that you saw in 1946 or 1945 constructed?

(Testimony of Roscoe Fowler.)

A. Well, you mean what means for the particular adjustment [257] in question?

Q. Yes. A. It had a slot in the bracket.

Q. Were there any other differences in that Tavart hardware?

A. Adjustments, you mean?

Q. Any other differences at all?

A. None that I know of. Different from what?

Q. Different from yours.

A. In 1946 or 1945?

Q. Yes, when you first saw it.

A. Yes, there was a difference. I believe they had a solid door support and a cantilever arm connecting to the door support.

Q. Reading from the file history of your patent, it says:

“The present invention greatly simplifies the hanging of overhead doors utilizing jamb hardware.”

Is it your contention that your patent simplifies the hanging to a greater degree than the Tavart hardware that you knew about?

A. I would say it is much more practical.

Q. Will you tell us how it is more practical than that Tavart hardware? [258]

A. There is no problem with the adjustment. Once the adjustment is made, why, it will stay.

Q. Will you repeat that, please?

A. I say there is no problem with the adjustment with the vertical position of the door. Once the

(Testimony of Roscoe Fowler.)

adjustment is made with the hardware, why, it stays.

Q. You say that is not true of Tavart?

A. Well, it is somewhat of a problem with Tavart.

Q. When the Tavart hardware is used to hang a door, how do you plumb the door?

A. You plumb the door with the hardware, all hardware.

Q. The door that the hardware is fastened to?

A. That depends on the man that is installing it. I think it is usually lined up with the jamb, the opening.

Q. After you fasten the hardware on it, can you plumb it?      A. Plumb the door?

Q. Can you straighten it out and make it vertical if it isn't vertical to start with?

A. I think the door is the place to start with. The adjustment is made before the door is used.

Q. That is the same way yours is put up, isn't it?

A. That's right.

Q. It was brought out in testimony earlier that you [259] had charged the Winchel Company with infringement of your patent. I will lay before you Exhibit L. I also want to lay before you another Winchel circular, Exhibit J. I want to ask you, is it your position that hardware of this structure infringes the patent in suit?

Mr. Fulwider: I object to that, your Honor. What does any layman, owner of the patent, know about whether hardware infringes other than what his attorney tells him?

(Testimony of Roscoe Fowler.)

The Court: He is the plaintiff here. If he doesn't make a claim of infringement, even though an attorney may make a claim of infringement, he is the real party in interest.

Mr. Fulwider: As long as we clearly understand he is not attempting to say or give reasons as to why it is or is not infringement, he can say what he wants to about it.

The Court: Objection overruled. He can testify whether or not he claims this is an infringement.

The Witness: It isn't fair, because I know it isn't now.

The Court: You know it isn't?

The Witness: That's right. I was under the impression it infringed at the beginning, I mean when we served notice on Mr. Winchell, I was under the impression it infringed on our hardware.

The Court: But you are willing now to say it doesn't [260] infringe?

The Witness: I know there is prior art on it.

Q. (By Mr. Beehler): Was there not some development along about the time you came out commercially with the device of the hardware in suit to show that there were advantages in a short cantilever arm over a long cantilever arm?

A. You mean for installation reasons?

Q. For any reason.

A. Well, that is the advantage. It is less bulky and easier to package, and so forth. That is one advantage.

(Testimony of Roscoe Fowler.)

Q. A short cantilever arm is better?

A. Yes. It goes in a shorter box.

Q. Are there any advantages for installation reasons?

A. Installation reasons? With a shorter cantilever arm?

Q. With a shorter cantilever arm.

A. I don't know really what that would have to do with it. I can't think of any reason for it at this time, any reason for it being an advantage.

Q. Is it not true, Mr. Fowler, that in the latter part of 1948 or the first part of 1949, you inspected a trial installation of a piece of Tavart hardware, saw it for the first time, and then measured it prior to your coming out with this device of the patent in suit? [261]

A. Every piece of hardware I have ever heard of, I inspected and measured. I think everybody does the same thing in the hardware business.

Q. Then it is true? A. Yes, it is true.

Q. That you measured up a piece of Tavart hardware? A. That's right.

Q. A month or so before you came out with the structure of the patent in suit?

A. I wouldn't say how much before.

Q. How long before?

A. I wouldn't attempt to say that.

The Court: Maybe this is a pretty good place to break for the day. It's nearly 4:00 o'clock.

How many more witnesses do you have?

(Testimony of Roscoe Fowler.)

Mr. Beehler: I have Mr. Matlin, who will be here to identify a date. It will take him five minutes. I have an expert, a practical expert, primarily for the purpose of summing up some of what we have talked about here and correlating it with the prior art, which I have not yet introduced, but which is pertinent to consider—prior patents, I should say, which are important to consider with the prior public use of the device.

The Court: Can we finish this case in another half day? [262]

\* \* \*

Q. (By Mr. Beehler): Mr. Fowler, did you bring with you today the drawing which you were requested to bring by subpoena duces tecum this morning?

A. I didn't know I was supposed to bring a drawing.

Mr. Fulwider: Did you serve the subpoena?

The Court: Will you speak up, please?

The Witness: I didn't know I was supposed to bring a drawing.

Q. (By Mr. Beehler): I take it then that the Marshal didn't reach you with the subpoena. I request you then, Mr. Fowler, to bring in to court tomorrow morning the drawing which you referred to last in your testimony on Friday, which you stated was in your office a month ago and which you haven't been able to find since.

Mr. Fulwider: We have a copy here you are

(Testimony of Roscoe Fowler.)

very welcome to have, if you had just asked for it. There are two there.

Mr. Beehler: May this be marked for identification as defendants' exhibit next in order?

The Court: Exhibit P.

Mr. Beehler: I would like to reserve the examination of this.

The Clerk: Defendants' Exhibit P for identification. [267]

\* \* \*

Q. (By Mr. Beehler): Now, Mr. Fowler, at the taking of your deposition you stated, in answer to this question I read, "After the improvement which you just now mentioned, what, then, would you say was the next major improvement?"

"A. As I remember, after that came the later type hardware, with the two-piece cantilever arm and the decreased head room.

"Q. When did that take place?"

"A. I believe about 1949, February—January, February, maybe March."

Is that still your contention, that that is the date when the two-piece cantilever originated with you?

A. That is right.

Mr. Beehler: That was at pages 13 and 14.

Q. (By Mr. Beehler): Now, also in your deposition, on page 30, in connection with questions regarding the Lo-Head jamb type hardware, I read as follows:

"And in the construction in the Lo-Head jamb type hardware, did you make some that had the



(Testimony of Roscoe Fowler.)

cantilever arm extended?           A. No.

“Q. Did you ever make any that had a cantilever arm extended in that way?           A. No.

“Q. Did you ever make any that had the main arm [268] extendible, the way it is shown in the patent?           A. No.”

I ask you now, is it still your statement, or, do you still make the statement that the Lo-Head jamb type hardware, which you initially manufactured, was not sold with an extendible cantilever arm?

A. That is right.

Mr. Fulwider: May I ask a question? In the deposition the question was, “Did you ever make.” Now Mr. Beehler says “Did you ever manufacture.”

I think he ought to clarify what he means by “manufacture.” Does he mean “manufacture” for sale or “manufacture” experimentally, or what?

Mr. Beehler: That is reasonable.

Q. (By Mr. Beehler): Is it still your contention that you did not manufacture for sale the Lo-Head jamb type hardware with the extendible cantilever arm?

A. I am not sure I understand the question right. If you mean——

Mr. Beehler: Will you read the question?

(The question was read.)

The Witness: I never manufactured it for sale.

Q. (By Mr. Beehler): You have not manufactured that type of jamb hardware for sale, is that your answer?           A. That is right. [269]

(Testimony of Roscoe Fowler.)

Q. Did you sell any jamb type hardware, Lo-Head jamb type hardware that did have a cantilever arm, which was extendible?

A. Did I sell any?

Q. Yes. A. That is extendible? No.

Q. Were you aware, Mr. Fowler, in early 1948 or during 1948, of a distinction which the trade drew between a long cantilever arm and a so-called short cantilever arm? A. Yes.

Q. Do you recall when it was that you saw the first example of the Tavart hardware that had a short cantilever arm? A. No, I don't.

Q. Do you have a salesman working for you by the name of Johnnie Owen?

A. No, I haven't.

Q. You did have a salesman by the name of Johnnie Owen working for you in 1948?

A. Yes.

Q. Did you not, in company with Johnnie Owen, inspect a service trial installation of the Sturdee jamb type hardware, with a short cantilever arm, sometime in 1948? A. A Sturdee——

Q. Excuse me. May I be corrected? Tavart type, a piece of Tavart hardware with a short cantilever arm. [270] A. I don't recall.

Q. Mr. Fowler, you produced some literature here showing your Econo-Jamb. I ask you to re-examine Exhibit 14, which is a piece of Sturdee Econo-Jamb literature, and open it at the inside, where there are pictures of cartoon characters of

(Testimony of Roscoe Fowler.)

a little man. Are those the cartoon characters you complain of, as being copied by the defendant?

A. Maybe he is not in the same position, but it is the same character.

Q. What is the date of that piece of literature which you hold in your hand? When was that published?

A. I wouldn't have any way of knowing.

Q. What was the earliest date you did publish for distribution any literature with that little cartoon man on it?

A. I really don't know.

The Court: May I ask this witness a question?

Mr. Beehler: Yes.

The Court: Did you get that picture from some other publication?

The Witness: Our advertising agent originated this.

The Court: Do you know whether he originated it or whether he copied it from some other—

The Witness: He originated it.

The Court: You think he originated it?

The Witness: Yes. [271]

The Court: Was he working for you?

The Witness: Yes.

Q. (By Mr. Beehler): You stated, I believe, Mr. Fowler, that Mr. Moore, who testified here, acting under your instructions, did the art work and photography for certain instruction sheets. When was the first instruction sheet printed and distributed, which Mr. Moore was responsible for the art work on?

(Testimony of Roscoe Fowler.)

A. I have no way of telling.

Q. Do your records tell that?

A. The records would probably tell it.

Q. After the recess will you produce, will you provide us with that information, please?

Now, Mr. Fowler, you are familiar, of course, with your own jamb type hardware of the sort which is in issue here and you are familiar with the defendants' alleged copying of that hardware.

Would you point out, Mr. Fowler, if you can, what ornamental or non-functional features of your hardware which were copied by the defendants?

The Court: May I interrupt? You contend there is any ornamental question here?

Mr. Fulwider: I was going to say we stipulated the other day, I think, there was nothing ornamental about this.

The Court: Let us eliminate the ornamental part. [272]

Mr. Beehler: That stipulation is accepted.

I introduce in evidence now a certified copy of the file history of the patent in suit, No. 2,516,196.

The Court: It may be introduced and marked Exhibit Q.

The Clerk: Exhibit Q in evidence.

(The document referred to was marked Defendants' Exhibit Q and received in evidence.)

Mr. Beehler: I wish to refer to page 40 of the file history, to a brief sentence which has reference to the drawing of the patent in suit. May I read it?

(Testimony of Roscoe Fowler.)

Mr. Fulwider: You are referring to what page?

Mr. Beehler: Page 40 of the file history. Reading from page 40, the last sentence of the first paragraph, at the top of the page:

“For example, the length of the member 16 might be made adjustable, in which case the advantages of the invention could be obtained without adjustment of the length of the link 14.”

Q. (By Mr. Beehler): Calling your attention to the drawing of the patent in suit, and particularly the member 16 just referred to in that quotation, and the link 14, also just referred to in that quotation, is it your contention that the advantages of the invention could be obtained without adjustment of the link 14, if the member 16 were made adjustable? [273]

Mr. Fulwider: Would you read that again? I haven't been able to find it in our file. It doesn't seem to be complete.

Mr. Beehler: Here it is.

The Court: Will you read that last question?

(The question was read.)

The Witness: The answer to that would be yes.

Q. (By Mr. Beehler): You knew, I assume, Mr. Fowler, Mr. Earl Murphy? A. Yes.

Q. He was an employee of yours in 1947, am I correct? A. Yes.

Q. Is it not true in 1947, Mr. Murphy demonstrated to you an item of jamb type hardware with a single angle iron for attachment to the door, in

(Testimony of Roscoe Fowler.)

which the cantilever was attached to the angle iron by means of a pin or rivet or comparable fastening means to or through a slot in the angle iron?

A. It is not.

Q. You knew, however, of that sort of an adjustment, did you not, in 1946?      A. I did not.

Q. What kind of a piece of jamb hardware did Mr. Murphy show you in 1947?      A. 1947?

Q. Yes. [274]

A. I didn't know he showed me any.

Q. Did he show you any in 1946?

A. Not that I know of. I understood you to say '44.

Q. Well, I say, did Mr. Murphy show you any type of jamb type hardware in any of the years 1944, 1945, 1946 or 1947?

A. Earl Murphy worked on the Lo-Head set, the original Lo-Head set. That was the only jamb hardware he ever had anything to do with around my place.

Q. Was there a slot in the angle iron in that hardware just mentioned?      A. No.

Q. There was never?      A. Never was.

Q. Who did the art work, Mr. Fowler, for you, before February of 1949?      A. The art work?

Q. Yes.      A. On what?

Q. On jamb type hardware.

A. Carvel Moore, I believe.

Q. Mr. Moore did it before February?

A. I believe so.

Q. Who did the photography for you on jamb

(Testimony of Roscoe Fowler.)

type hardware before February of 1949? [275]

A. Carvel Moore.

Q. How early did Mr. Moore start to do that art type work on the jamb type hardware for you?

A. I don't know.

Q. Did you employ anyone else, prior to your employment of Mr. Moore, for the work that I just mentioned?

A. Prior to Mr. Moore?

Q. Yes. A. Not that I remember of.

Q. Is that the same H. C. Moore who made the original of the drawing No. 491, which you exhibited and presented here today in court?

A. Yes.

Q. Tell us, Mr. Fowler, to what class of trade you presently sell the jamb type hardware of the type here in issue. What I mean is, do you sell to wholesalers or jobbers or retailers, or to whom?

A. We sell wholesalers and dealers, door companies.

Q. You do not sell retailers, that is correct, is it not?

A. We have.

Q. Do you, as a business practice, sell retailers?

A. We do not encourage it.

Q. You have handled your business in that way, have you not, ever since you began the production and sale of the jamb [276] type hardware here in issue?

A. That is right.

Q. This drawing here, No. 491, which you exhibited here, Mr. Fowler, I call your attention to the fact that in the title block it reads as follows:

(Testimony of Roscoe Fowler.)

“Details of Olympic Jamb Type Hardware,” and bearing a date of September 1, 1948.

It was a fact, was it not, Mr. Fowler, this particular hardware was designed for the company handling Olympic hardware?

A. No, it is not a fact.

Q. Can you explain why that particular designation appears in the title block?

A. I believe the drawing is one year older than '48. In other words, it is September, '49, instead of '48. That is a typographical error.

Q. It is your contention this date that appears here, namely, 9-1-48, is in error, by year?

A. That is right.

Q. May I ask, did anybody ever call your attention to that here before?      A. Not here.

The Court: At any time?

The Witness: Yes.

Q. (By Mr. Beehler): When was it first called to your attention? [277]

A. When we found the print.

The Court: Just the other day?

The Witness: I would say we found the print about a month ago, or so.

The Court: About a month ago?

The Witness: Yes.

The Court: That is the first time anyone called your attention to it?

The Witness: That is the first time I ever saw the print.



(Testimony of Roscoe Fowler.)

The Court: That is the first time you ever saw the print?

The Witness: That is right.

The Court: Do you know how it came in your possession?

The Witness: It wasn't in my possession.

The Court: Where did you find it?

The Witness: At the patent attorney's office.

Mr. Beehler: I offer this in evidence.

Mr. Fulwider: May I expand on that a little bit? That was the office of Mr. Stephenson, who was the successor of Mr. Hall, who died, and having handled this matter we found it just about a month or six weeks ago.

Q. (By Mr. Beehler): Mr. Fowler, where is the original of that drawing?

The Court: He says he never saw it until a month ago.

The Witness: Your Honor, I think we found the original.

The Court: You found the original? [278]

The Witness: Yes. Mr. Moore had the original.

Mr. Fulwider: I believe Mr. Moore has a tracing. That is my recollection of the way he talked. When we found it we discussed the matter with him and asked him how come this 1948 date.

The Court: Cannot we stipulate? I do not know whether it can be stipulated. Perhaps it is not a stipulation. But draftsmen do not usually make mistakes.

Mr. Beehler: I will stipulate to that.

(Testimony of Roscoe Fowler.)

Mr. Fulwider: Usually they don't.

The Court: Draftsmen are very particular, very careful. It seems to be very peculiar for a draftsman to make a mistake of a year, in a date.

Mr. Fulwider: Even more peculiarly is the number 491. Mr. Ward tells us it is his code number he uses for drawings and he uses the same system for invoices. 49 means the year and No. 1 means the first drawing he made for Mr. Fowler in the year 1949. We taxed him with that and he swears up and down the 491 is controlling. We have an invoice that support that, which we can bring in.

We know this: That we didn't even think of Olympic until the year 1949, so it couldn't have been 1948. We didn't start selling Olympic until the spring of 1949.

I would like to put Mr. Moore on the stand, if I may, tomorrow—he is not available today—to explain this whole [279] matter. It looks screwy on the face of it, I grant you. It did to me, but I am firmly convinced that he did, for some strange reason, make a mistake in the year. He got his code system right. Those are the facts as I know them.

Mr. Beehler: I am afraid I can't stipulate to counsel's statement.

Mr. Fulwider: No, I don't expect you to.

Q. (By Mr. Beehler): I ask you, Mr. Fowler, who gave you the name Olympic, or, to Mr. Moore, when he put it on this drawing?

(Testimony of Roscoe Fowler.)

A. I don't know; probably me.

Q. This is the same hardware, is it not, that Vimcar, the defendant here, did distribute, which was supplied to them by you?

A. That is right.

The Clerk: Does your Honor want to mark that in evidence?

The Court: I thought this was in evidence.

Mr. Beehler: I did offer it.

The Court: No. It is only marked for identification.

Mr. Beehler: I offer it now in evidence.

The Court: It may be received and marked in evidence.

The Clerk: So marked, Exhibit P.

(The document referred to, previously marked for identification as Defendants' Exhibit P, was received in evidence.) [280]

\* \* \*

### Cross-Examination

By Mr. Fulwider: [281]

\* \* \*

Q. Will you explain to the Court the hardware that was sold by you which involved this two-piece—I call it jackknife—jackknife type cantilever arm and whether or not it had any extension, and if you will go on, please, and discuss the matter of the boomerang we put a photograph in to show—

First, let's get at it this way: You did sell hardware that you call Lo-Head, as I remember?

(Testimony of Roscoe Fowler.)

A. That is right.

Q. That Lo-Head hardware was similar to what?

A. That is the first hardware sold under that trade-mark. It was similar to what is shown in this patent, with the exception of the extendible cantilever arm.

Q. It was the same as this hardware shown in Exhibit O? It had a one-piece cantilever arm, is that it? A. That is right.

Q. When you say "cantilever arm," you mean this arm marked 15, do you not?

A. That is right.

Q. There were no extensions there?

A. No.

Q. No slots? A. No.

Q. No holes? [282] A. No.

Q. Now then, were very many of those sold?

A. I would say approximately 400 sets.

Q. What was the next change in that type of hardware you sold under the name of Lo-Head?

A. The boomerang arm was curved.

Q. Now, the boomerang arm, is that this one, No. 17? A. That is right.

Q. The one marked red, that goes at the upper angle?

A. That is right. That was changed.

Q. I call your attention to this photograph, Exhibit 23, which I believe is only marked for identification so far. Can you identify that photograph? And, if so, will you point out therein the boomerang arm you just mentioned?

(Testimony of Roscoe Fowler.)

A. There is a boomerang arm, the curved arm (indicating). See this arm here stops right in the middle of the jamb, and it made a bad mark on the door opening, so we curved this arm so that would extend this over into the opening, and not scratch the jamb. That was the reason for the change.

Q. As I remember it, this boomerang, that is, the change from this straight arm, I think it is 17, to the curve, which you call a boomerang, was a suggestion made by Mr. McFadden while he was working with you?

A. Yes, Mr. McFadden did the job.

Q. That is the suggestion he referred to on the stand [283] the other day?           A. Yes.

Q. Were any of these boomerang Lo-Head sets that were sold, did any of them have a pin and slot two-piece cantilever arm?           A. No.

\* \* \*

D. R. MATLIN

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: D. R. Matlin.

Direct Examination

By Mr. Beehler:

Q. Mr. Matlin, will you tell us what your business is, please? [284]

\* \* \*

(Testimony of D. R. Matlin.)

A. Overhead door business.

Q. Are you an installer or manufacturer, or what?

A. I wouldn't classify myself as either one. I don't manufacture. I sell overhead doors. I have men who do the installing.

Q. In the installing they use jamb type hardware, is that right?

A. They use jamb, pivots, track, sectional roll-up and several others.

Q. How long have you been in that business?

A. Well, I have been off and on for over ten years.

Q. What is your present address?

A. Sir?

Q. Your present address, the address of your business.

A. 6549 West Boulevard, Inglewood. [285]

\* \* \*

Q. Do you recognize this gentleman sitting here? A. Which gentleman is that?

Mr. Beehler: Will you raise your hand?

The Witness: I think he was at my place some time ago, yes.

Q. (By Mr. Beehler): Do you recall telling him that you entered the premises which you now occupy in about July or August of 1948?

A. I thought I did. [286]

\* \* \*

(Testimony of D. R. Matlin.)

According to this then—I read a little hastily. I did move in before '49. This rent is paid from December 15, 1948, to January 15, 1949. I was trying to find a previous stub, but I can't find it in here.

Q. What was the amount of that rent that is indicated there?

A. It is funny, I pay \$75.00, but this thing here is only \$20.65. Let's see, I must have taken some off for some reason. I see here an invoice to Roy Sheet Metal. It was \$54.35. They probably did some work at the place which I took off from the check, because the total check is \$75.00.

Q. Who is Roy Sheet Metal?

A. Right next door to me, next door to me. According to this I must have moved in before December 14, 1949. [287]

\* \* \*

Q. You have purchased, have you not, garage door jamb hardware from Mr. Murphy, is that right?

A. Yes.

Q. How long have you purchased from him?

A. Well, I believe I started purchasing in 1947. At that time I think he was associated with Mr. McFadden, King Hardware, although I was under the impression that he was running the shop; at least, he gave me the impression he was managing it. I think King Hardware was really making it, and he was selling it, although my business was directly with Murphy, I gave him the money all the time, I think he was with McFadden, King

(Testimony of D. R. Matlin.)

Hardware. That was the latter part of '47 and early part of '48. [288]

\* \* \*

Mr. Beehler: Will you please mark these for identification, two photographs?

The Court: They may be marked for identification only.

Mr. Beehler: One is an over-all view and the other a view of a portion of the first view.

The Court: Exhibits R and R-1.

The Clerk: So marked, your Honor. [289]

(The photographs referred to were marked Defendants' Exhibits R and R-1 for identification.)

Q. (By Mr. Beehler): Mr. Matlin, do you recognize these premises pictured in Exhibits R and R-1? A. Yes, sir, those are my shop.

Q. Do you recognize the hardware there?

A. Yes, sir.

Q. Do you know whose hardware that is, who manufactured it?

A. This particular set was made by Murphy in my shop; at that time he was under agreement with me. He was supposed to make the stuff and I was going to sell it. But he didn't live up to his agreement, and when he left I was happy.

\* \* \*

Q. How long did Mr. Murphy work for you, do you know?



(Testimony of D. R. Matlin.)

A. He was working for me a couple of years before we moved in. He was hanging doors for me, installing doors.

Q. Do you recall when he first made those items of [290] jamb hardware, like pictured in the picture?

A. He started to make jamb hardware, at least I thought he was—it was really King Hardware—way back in 1947. So far as I can recollect, it was, but it wasn't exactly the same as this, the principal—the kicker plates are the same. I really don't know the difference between all the sets there are.

Q. This piece of hardware, in any event, which is shown in these two photographs, Exhibits R and R-1, are pictures of hardware which were installed on your present premises?      A. Yes.

\* \* \*

I was under the impression it was installed in August or September, 1948. At least, I told that gentlemen back there that (indicating). I knew this morning I would need it, and I picked up my old check stubs. This is the oldest book I could find.

The Court: Regardless, it was installed about a month after you moved into the premises?

The Witness: Yes, sir. It took us nearly a month to [291] put up that garage.

Q. (By Mr. Beehler): When Mr. Murphy worked for you in that shop arrangement, as you mentioned, or he manufactured the hardware as you needed it, is that right?      A. Yes.

(Testimony of D. R. Matlin.)

Q. How did you pay him then?

A. We had kind of a funny deal. I paid him in all kinds of moneys. As a matter of fact, he was broke most of the time and I would advance him money to get the machinery. He would pay that off and work for me, and would subcontract under a supposed license. I would pay him in every way, as a worker, as a manufacturer, as a salesman and subcontractor.

You take a fellow like that, you want to help them along every possible way, to keep them going. I had to do a lot of outside work.

Q. Will you refer to your check stubs from about, let's say, August of 1948 up to about December, and point out the stubs which show payments to Mr. Murphy?

The Court. I want to see those pictures.

Mr. Beehler: Yes, sir.

The Witness: Here is a check, March 5th, to Mr. McFadden. Here is a check to Earl Murphy, August 9th.

The Court: What year?

The Witness: 1948.

Q. (By Mr. Beehler): Subcontract No. 27, what would that indicate? [292]

A. Well, it would indicate the fact that he did some work for me.

Q. What number is that? What stub contract number? A. No. 27.

Q. Here is No. 15 on May 2, 1948.

A. He did all this—there was some before that.

(Testimony of D. R. Matlin.)

But we are not interested in that. You want Subcontract No. 24. Here it is.

Q. Subcontract No. 27, it says here.

A. Subcontract No. 27?

Q. Yes.

A. Subcontract No. 26, here we are. Well, he hanged a double jamb set for Mr. Kanowsky, 4120 Mansel Avenue; did some work for Lindley and hung some doors for Circus Center up on Linrock. That check was——

Q. The check was for \$17.50?

A. That was just for some work he did for me.

Q. Now, Mr. Matlin, will you again refer to your check stubs? I note here one indicating payment to E. Murphy in the sum of \$105.75 for Subcontract No. 28. Do you have any notation of what that might have been?

A. That was for Subcontract No. 28, \$128.00 less some hardware, \$105.75. He did a conversion job for Smith at 2220 Parnell and then he hanged some hardware in National-Sepulveda; we [293] did a project there, about 450 houses there.

He worked on Rosemead, Rosemont & Budlong Corporation. I think we used King hardware or Murphy hardware on that project. I don't know which was which. On National-Sepulveda he installed ten single jambs.

\* \* \*

Q. You have a notation on this project of "Hardware bill paid \$23.00." What would that mean?

(Testimony of D. R. Matlin.)

A. I bought hardware from him, as he manufactured it; I paid him cash for the hardware. [294]

\* \* \*

Q. (By Mr. Beehler): Now, Mr. Matlin, over the recess you have helped us with some of these check stubs. May I call your attention now to Stub No. 2603, dated November 24, 1948, to Earl Murphy, "For Loan for Punch Press \$200.00." Can you explain that?

A. Well, as I said before, he was always broke and his machine broke down and I loaned him some money to buy a new machine, a new punch press.

Q. The fact that the machine broke down, which necessitated loaning money for a new one, indicates to you, I believe, you told me, he was using one before.

A. Yes. You have to have a punch press to make that hardware.

Q. The punch press is used to make the holes, is it? A. Yes.

Q. And the slots.

A. Well, I don't know about slots. I am no mechanic or machinist. I am not an engineer. I just sell hardware and install—have the boys do all the mechanical end.

Q. How long was it before this date of February 24th, as near as you can estimate, that Mr. Murphy was using the press that broke down?

A. Well, he never did buy that machine. I guess he bought secondhand machinery, in the first place, so I don't think it would hold up very much. I

(Testimony of D. R. Matlin.)

suppose probably his [295] old punch press probably was good for a couple of months or so; I don't know. [296]

\* \* \*

Q. Turning back again to Mr. Earl Murphy's use of the punch press, and the punch press, I assume, was on your premises, is that correct?

A. Yes, sir.

Q. The devices that he was using, the punch press would make, that was jamb type hardware of his particular design, was it? I am referring again to these photographs. Is this the hardware he was turning out by use of the punch press?

A. Well, he was turning out hardware for quite a while, but as I said before, I don't know. The hardware is Greek to me. It all looks the same to me. I don't know which is which. They all work the same way, and they all work on the same principle. I don't know whether this is what he has been putting out, or before or after.

Q. Calling your attention to the slot which appears on the angle iron up here, is it or is it not true, to the best of your knowledge, that was always the way that Murphy made the hardware that he made?

A. Well, I couldn't swear to that, not being a mechanic. I never paid any particular notice to that. I think Mr. [297] McFadden would be able to testify more truthfully. I would be more or less guessing.

Q. You told us during recess, did you not, Mr.

(Testimony of D. R. Matlin.)

Matlin, that with that Murphy hardware, it was always the same, so far as the way he made it? He always made it the same way, with a slot in it?

A. I don't know. I know he made jamb hardware that would always work the same way. I don't know whether he had a slot in there or whether he didn't. It was the same as what King made, the same hardware what King—I don't know when he started that slot or I don't know whether that slot was always in there or not; I couldn't say.

Q. Referring now back again, Mr. Matlin, to your first conversation with Mr. Jim Wooley, the gentleman here in court, it was true, was it not, when he first talked to you the first time he talked to you about when you might have moved into the establishment where these pictures were taken and that you thought it was in July or August of either 1948 or 1949?

A. I was under the impression it was in August, 1948. [298]

\* \* \*

Q. On the second occasion of your talking with Mr. Jim Wooley—I think he came back to you a second time—you said at that time, did you not, that you had reviewed the matter and that you told him it was in 1948?

A. I believe I did tell him that I was under the impression I moved in in August, 1948. And I was under the impression that the garage was finished about a month later, and the door was put in

(Testimony of D. R. Matlin.)

sometime either in September or October, that particular hardware here.

\* \* \*

But it seems like I was in there before that check, for the simple reason that I loaned him \$200.00 to buy his punch press. So, if I loaned to him in November I must have been in there in November, although I have no proof. I have no check to show that I [299] paid the rent. That is, I can't find the check.

Mr. Beehler: May I offer in evidence these two photographs, Exhibits R and R-1?

The Court: They may be received. [300]

\* \* \*

Mr. Beehler: I have here a sheet, current sheet of Tavart Construction. I see Mr. Varley in the court room.

I don't wish to burden the record with a lot of documents, but I would like to have Mr. Varley identify this as exemplifying the kind of instructions that are current in this business for installing jamb type hardware.

Mr. Varley, will you take the stand?

S. G. VARLEY

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: S. G. Varley.

(Testimony of S. G. Varley.)

Mr. Beehler: May this be marked as Defendants' Exhibit next in order?

The Court: It may be marked for identification only as Exhibit S. [305]

\* \* \*

### Direct Examination

By Mr. Beehler:

Q. Mr. Varley, will you state for the record your business connection?

A. I am manager of Tavart Company.

Q. You have been associated with the Tavart Company for how long?

A. Since it started in 1945.

Q. I show you, Mr. Varley, an instruction sheet, Defendants' Exhibit S for identification, and ask you if you recognize that sheet. If you do, will you tell us when it was printed?

A. I couldn't give any date, exact date, but the first one similar to this was printed—I think it was around in 1949. We made quite a few changes in that particular sheet. I wouldn't try to give a date.

Q. Is this type of instruction sheet one you customarily use and put in your sets of hardware for the guidance of somebody that is installing it?

A. We develop that sheet, yes, sir.

Q. This is your own development, this sheet?

A. Yes.

Q. By your own artists, I assume?

A. That is right.



(Testimony of S. G. Varley.)

Q. Prior to this sheet, did you have other [306] similar sheets?      A. We have many of them.

\* \* \*

Q. While you are here with us, Mr. Varley, will you tell us, as near as you know, when you first began to use this type of hardware, that is, with a single angle iron on the door and having a slot in the jamb plate, to which the cantilever is fastened?

A. 1945. [307]

\* \* \*

S. K. COULTER

called as a witness by and on behalf of the defendants, being first duly sworn, was examined and testified as follows.

The Clerk: Will you state your name, please?

The Witness: S. K. Coulter.

\* \* \*

Mr. Beehler: I wish to offer as the next exhibit, Patent to N. W. Smith, No. 2,569,351.

The Court: It may be received and marked Exhibit T. [308]

\* \* \*

Mr. Beehler: I wish to offer this brochure of prior art patents, to which notice has already been given to the defendants. There are 15 patents, bound together and numbered, 1 through 15, inclusive.

The Court: It may be received and marked Exhibit U.

\* \* \*

(Testimony of S. K. Coulter.)

The Court: We can have it marked Exhibit U-1, 2, 3, 4, 5, to 15.

Mr. Beehler: That will work out nicely.

The Court: It will be re-marked.

\* \* \*

The Court: Before we proceed, I want to ask counsel a question in regard to this exhibit. The witness testified [309] they have been making this kind of hardware with the slot since 1945. I don't know whether the witness intended to indicate anything other than just the slot. That was the question asked, just as to the slot. Or whether it was as to the adjustment.

Now, this so-called lever arm you have been talking about, at one time it was attached separately to the door.

In this exhibit it appears attached to the angle iron on top of the door. Now, am I to take it that this particular hardware was manufactured beginning with 1945 and the lever arm was attached to the angle iron on top of the door?

Mr. Beehler: No. That is not true. There was a point, somewhere between 1945 and the current date, when the so-called gusset plate or that little extra plate in there was added.

The Court: The only thing you have intended to bring out was the use of the slot for the adjustment?

Mr. Beehler: The use of the slot at the jamb plate.

The Court: For adjustment?

(Testimony of S. K. Coulter.)

Mr. Beehler: For adjustment.

The Court: That is the only thing you intended to bring out?

Mr. Beehler: By that witness, yes, sir.

The Court: All right. That is fine.

### Direct Examination

By Mr. Beehler:

Q. Mr. Coulter, will you tell us what [310] your business is, please?

A. I am in the garage door business. Installation only of built doors and installing—by “install” I mean hardware.

Q. How long have you been in that business?

A. It was established in 1938.

Q. You are licensed in California, I suppose?

A. Yes, sir.

Q. You belong to any builders' associations or contractors' associations?

A. Yes, I belong to the Contractors' Association in our local in San Gabriel Valley.

Q. Prior to your engagement in this business, had you any experience in hardware or, rather, experience as a carpenter or mechanic?

A. I was in the—I worked for construction work for Myers Bros. Construction Company.

Q. What kind of garage doors, or, what kind of garage door hardware, Mr. Coulter, have you installed?

A. Well, there is pivot, jamb, track, Lo-Head

(Testimony of S. K. Coulter.)

room pivot, Lo-Head jamb. I guess you could name a great many of them. The standard makes would be pivot and jamb and track type. I think that would cover most of what you would want to know.

Q. Can you give us an idea of the sum total of garage door hardware items you have [311] installed?

A. Well, in the neighborhood of 10,000 sets, I would say. I never get down and figure that up. I approximate that.

Q. Now, I will name these types of manufacture. You may answer yes if you install them. Front track type.

A. No.

Q. Stanley. A. No.

Q. Holmes. A. Yes, sir.

Q. Tavart. A. Yes.

Q. Winchel. A. Yes.

Q. Atlas. A. Yes.

Q. Osborn. A. Yes.

Q. Vulcan. A. Yes.

Q. Ace. A. I wouldn't be too sure.

Q. Sturdee. A. Yes.

Q. In the installation of garage doors, hung on jamb type hardware, about how much tolerance do you work with? [312]

A. I work on Jamb Type and all types, we work at a tolerance of an eighth of an inch, as a maximum. The Jamb Type, it is really worse to even allow that much.

Q. When you refer to an eighth of an inch tolerance, explain that.

(Testimony of S. K. Coulter.)

A. In your measurement and setting of brackets, and such things as that. That is on your pivot points and those things that are very essential to the operation of the door.

Q. Referring, Mr. Coulter, to the usual Jamb Type hardware, which Exhibit 2 is exemplary of, will you describe just briefly the steps in setting that on a door and hanging the door in the doorway of a garage?

A. Well, we would, as the first step, or, my first step is the plumbing of your opening and leveling your head, to be sure your building is properly built, before you start in. Then you take your measurements down from the underside of your head and that depends upon, that measurement depends on what type of hardware you are hanging.

You get that point and your door is then—you drill your holes, and then your door is set up in the opening plumb, with space under and on each side.

Q. When you say, “drill holes,” you mean drill holes in the jamb?

A. In the jamb, that is right. Then your hardware, the pivot bracket is attached to your jambs and with your [313] door plumb you attach your angle in this particular hardware. With different hardware it would be different. This particular one, you attach the angle and the long angle which goes on the door, and then checking again to see that your door is plumb, you fasten up your connecting links, and add your spring and lift your door. Con-

(Testimony of S. K. Coulter.)

nects your spring to the fastener at the bottom of the jamb, and from then on it is an adjustment which would be hard to tell here, or to anybody else. It is something that each door has, its own adjustment.

Q. Is it possible, by the use of this type hardware, to so hang the door, in the first instance, that the door will be plumb without further adjustment, once the hardware is fastened to it?

A. Yes, the door is plumb at first, and you fasten it up plumb and put everything plumb.

Q. Now, Mr. Coulter, you are familiar, I believe you said, with the Sturdee hardware?

A. Yes, in some degree, of all of them.

Q. Do you know how the hinge is adjusted for length in that hardware?

A. What was that?

Q. How the length of the cantilever arm is adjusted, for length.

A. Yes, sir.

Q. You are familiar, are you not, with the [314] Tavart hardware?

A. Yes, sir.

Q. You recognize that the adjustment is at the plate, a slot in the plate of the Tavart hardware?

A. Yes, sir.

Q. You are familiar, are you, with the Winchel hardware?

A. Yes, I have hung the Winchel hardware; I understand it.

Q. You are familiar with the adjustment as being in a slot at the end of the cantilever, which fastens to the angle iron on the garage door?

(Testimony of S. K. Coulter.)

A. Yes, sir.

Q. Are you also familiar, Mr. Coulter, with the Murphy type hardware? Is that included in any you——

A. I don't believe so, as being put up under that name; I couldn't say I was.

Q. I show you a photostat, Mr. Coulter——

Mr. Beehler: I request this be marked as defendants' exhibit next in order, for identification.

The Court: It will be marked for identification as Exhibit V.

The Clerk: So marked, your Honor.

(The document referred to was marked Defendants' Exhibit V for identification.)

Q. (By Mr. Beehler): Will you tell us, briefly, Mr. [315] Coulter, what is shown on this photostat?

A. Well, this is a drawing of different types of jamb hardware, showing them in different positions; completely open and partially open.

Q. That photostat is illustrative as to comparison, is it not? A. Yes.

Q. It was made with your approval?

A. Well, I saw it in your office, yes.

Q. Now, referring to that photostat, which you have before you, Figure 1 is a figure of the Fowler Patent in suit, is it not? A. Yes, sir.

Q. The figure immediately to the left of it is an illustration of the old style Tavart hardware?

A. Yes, sir.

Q. The view next, to the left, is an illustration

(Testimony of S. K. Coulter.)

of some type of hardware shown by advertisement of the Coffey Overhead Doors, Inc.?

A. It is one of the older types of hardware.

Q. The figure on the far left is an illustration of the Winchel hardware, is that correct?

A. Yes, sir.

Q. Now, Mr. Coulter, referring to Figure 1, which is the Fowler hardware, tell us how that particular hardware can be [316] used to adjust the door, to make it plumb.

A. Well, I believe you mean the——

Q. The one on the extreme left.

A. So it would take care of both the thickness and the door, to plumb the door.

Q. Yes.

A. Your lever arm which is marked 14, I believe is the number of it, is adjustable. The slots in the center, which either lengthens or shortens, whichever you wish to bring your door to, either in or out——

Q. That changes the effect of distance between what points on that drawing?

A. Between the pivot points on the lower—the lower pivot on your jamb plate, and the pivot on your gusset plate, in this particular—I heard that name and I think it is pretty good——

Q. Now, referring to the illustration of the old style Tavart, will you explain briefly how the adjustment, if any, is made on that part there for straightening out the verticality of the door?

A. This drawing wouldn't show it, but it does



(Testimony of S. K. Coulter.)

have a slot in the plate, which vertical slot allows this to be pulled up or lengthened out, which brings your door forward or backward.

Q. You may, if you choose, Mr. Coulter, mark the points [317] where the effective distance needs to be changed, to make an adjustment.

A. Well, your door in a down position would be the proper way to be able to explain this. In other words, you could pull your door either forward or backward, by raising——

Q. The bottom of the door?

A. ——the bottom of the door either forward or out, either one, by raising it in this slot here (indicating). In other words, that would bring it in by raising this slot.

Q. May I mark the slot you referred to with a reference character of 10, is that correct?

A. Yes.

Q. And the other pivot point, if I may mark with a character 11, is that correct?

A. Yes, sir.

Q. It is the distance between those two points which needs to be changed, I believe you said?

A. Yes, sir, that is right, bringing it back in; that is right.

Q. Skipping the Coffey one for a moment and referring to the Winchel door, will you explain how that particular kind of hardware would be used to straighten out the verticality of the door?

A. They have it in this figure, which shows it the best—— [318]

(Testimony of S. K. Coulter.)

Q. Figure 4.

A. They have this particular plate, Figure 5, yes. This particular plate is slotted and bolts it to this angle (indicating).

Q. The particular plate you refer to is an angle iron?  
A. Well, it is a flat bar.

Q. A flat bar?

A. Yes. It bolts to the angle iron on the door. It has the angle iron slotted and bolts come through this plate, and by raising or lowering that they either pull the door in or out.

Q. That changes the effect of the distance between what points? You may mark on the drawing if you wish.

A. It would be the distance between here (indicating).

Q. Here (indicating)?

A. Here and here on the door, it is down in a vertical position (indicating).

Q. By the first "here," may I mark it "10"?

A. Yes.

Q. And the second "here"—

A. Up here or up here (indicating).

Q. Would be at what point?

A. This is right in here (indicating). It would be where your slots and your bolts are.

Q. If I draw a line in that fashion at the junction of [319] this gusset plate and the green bar—

A. That is right.

Q. —that is the other extreme? A. Yes.

Q. And I mark it 11, is that correct?

(Testimony of S. K. Coulter.)

A. Yes. [320]

\* \* \*

Q. I wish to refer you now, Mr. Coulter, to Defendants' Exhibit C-4, which is captioned, "Coffey Overhead Doors, Inc." Will you examine that exhibit, Mr. Coulter, please?

A. (Witness complying.)

Q. Do you recognize there the two different types of jamb type hardware?

A. One type of jamb and one of pivot.

Q. Excuse me, two types of garage door hardware.

A. That's right. [324]

Q. The type on the left is what kind?

A. Pivot type.

Q. And the type on the right is what type?

A. Jamb type.

Q. Now, I call your attention, Mr. Coulter, to the legend underneath the illustration on the right-hand side, if you will count down to line 7. I have indicated those lines there to help a little bit. Will you read there into the record what it says, beginning with the words, "Adjust door in opening"?

Mr. Fulwider: Starting where?

Mr. Beehler: Line 7.

The Witness: You are starting in the middle of the sentence. Okay. "Adjust door in opening by moving the long arm up or down."

Q. (By Mr. Beehler): You might read through to the finish of that legend, if you will, please.

A. Excuse me. "When set be certain to have this bolt tight. Now raise the door and prop it open;

(Testimony of S. K. Coulter.)

attach the springs to arms and attach spring anchors to jambs with enough of the eye bolt extended through for a nut. Adjust door.”

Q. Now, referring back to the first of that quotation, “Adjust door in opening by moving the long arm up or down,” in that easy jamb model illustrated there, how would [325] that adjustment ordinarily be made?

A. Well, it doesn't show a definite detail as to how it would be, but the arm had to be somewhere, it had to have a slot to be able to move that up and down, or some manner of being able to move it up and down. It doesn't just show it in the detail, but there would have to be some way or other to do it.

Q. If there were no provision for moving it up and down, there would be no sense in that statement, is that your contention?

A. That's right.

Q. Now, the last sentence, which says, “Adjust door,” do you have an understanding of what that would mean?

A. Well, that could be your spring adjustment, or a lot of different ways, if necessary, to make a door operate. Each one individually is an item in itself.

Q. Now, Mr. Coulter, referring to the illustration on the left-hand side with the picture captioned, “Easy pivot model,” in your door-hanging experience, you said, I believe, that you have hung pivot models of doors?      A. Yes, sir.

(Testimony of S. K. Coulter.)

Q. Have you seen any pivot models of that general construction? A. Yes, sir.

Q. Have you hung pivot models of that general construction? [326]

A. I haven't hung, but I have taken out quite a few of them.

Q. Do you understand, Mr. Coulter, how that type hardware is attached to the door?

A. Yes, sir.

Q. Is there any adjustment in that type of hardware? A. Yes, sir.

Q. Would you explain that adjustment, please?

A. This is in the arms, both top and bottom, in the wishbone arm, there is two channel irons, we call them, one lays inside of the other one, and they are slotted so they can be set back and forth and locked there with nuts.

Q. Is it possible to shift the door a little bit to make it vertical by the adjustment of one or another of those what you call the wishbone arms?

A. That would be the purpose of them, because it would allow for thickness in the door and to adjust your door for perpendicular.

Q. Now, will you refer again, Mr. Coulter, to the photostatic sheet presented here yesterday as the last defendants' exhibit? Is the Coffey jamb type hardware which you just referred to the same as that picture third from the left on the photostat? Is that correct?

A. I would say it was. [327]

Q. Now, Mr. Coulter, will you refer, please, to

(Testimony of S. K. Coulter.)

your copy of Wolf patent No. 2,166,898, which is the fifth patent in the book presented in evidence?

A. Yes, sir.

Q. Will you explain briefly the type of hardware that you find there, which I believe is pictured most clearly in reference to Fig. 2?

A. It is very similar to the pivot type we had on the Coffey. The arm adjustments are the same. The channel irons, as near as this print can show it, looks to be.

Q. Could the door hung by hardware as pictured in the Wolf patent be adjusted so as to make it vertical in the doorway? A. Yes, sir.

Q. That would be by the adjustment of the arms, I believe you just said?

A. The adjustment of the arms slotted. There is one bolt there you loosen to adjust it.

Q. And the adjustment on those arms with the slot and bolt is variable to any distance at all within the limits of the slot, is it not?

A. That's right, to take care of offsets, also, to the wall where the arm has to be longer for this type hardware.

Q. Now, refer, please, to Holmes patent No. 2,228,314, [328] which is No. 9 in the brochure of patents. By reference to Fig. 1, which I believe is clearest there, will you explain how that particular type of hardware there pictured can be adjusted, is adjustable?

Mr. Fulwider: Which one?

Mr. Beehler: Holmes No. 2,228,314.

(Testimony of S. K. Coulter.)

Q. Will you just hold your answer a second until counsel finds his copy?

Mr. Fulwider: That is No. 9 of the book?

Mr. Beehler: No. 9 in the book, yes.

Q. Will you proceed, please, Mr. Coulter?

A. This is rather indefinite as to just the exact way, but from appearances, I would say there were set screws of some sort that you loosen for adjustment to your length for your offsets, and the width of the door and plumbing, and so forth.

Q. May I call attention, to assist in this, to page 2 of the patent, column 1, beginning line 22, which reads:

“The arm 4 consists preferably of two forks, including an upper fork for a and a lower fork for b, and these forks are preferably made extensible; and in the present construction, include sleeves 9a and 9b that telescope over the ends of the forks adjacent the [329] door 10. These extensions 9a and 9b can swivel on the forks 4a and 4b, and are preferably provided with means such as set screws 11 for securing them rigidly in any position desired.”

With the aid of that explanation which appears on the face of the patent, can you help to explain how the operation of the hardware is?

A. Yes. As I say, it appears to be that there are two set screws there on each arm which you loosen, which allows you to either extend the hardware further to the wall, or either extend the door

(Testimony of S. K. Coulter.)

forward or back or perpendicular, or whatever is necessary.

Q. If you were to extend it forward and back, you adjust the arms on both the left-hand and right-hand side of the door, is that correct?

A. Yes.

Q. And to shift it with relation to the wall, you make another adjustment?

A. Well, no. The same adjustment would give you your offset, because it has to lengthen the arms, also. If your adjustment is further to the side, it has to lengthen your arms also.

Q. You can lengthen one arm more or less and the other arm will compensate for it?

A. Yes, that's right. [330]

Q. Now, refer, please, to Peck, No. 2,233,638, No. 10 in the brochure, and having reference more particularly to the figure 1, will you explain how that type of pivot hardware can be adjusted, if it can be?

A. At the pivot point, they have a——

Q. You refer to the reference character 7?

A. Yes. Well, it is Fig. 6 here. That gives you a detail of the pivot itself right below the patent or the main drawing. That is the pivot itself.

Q. Yes.

A. It has set screws in both the top and side, which gives you—by loosening those, to get both an adjustment in length and an adjustment for angle, because the arms fit in there rather loosely and the set screws hold them in shape.



(Testimony of S. K. Coulter.)

Q. Is it or is it not possible to change the vertical position of the door by the adjustment of the position of either the arm 16 or the arm 17a? That applies to both the arms, is that your answer?

A. Yes, sir.

Q. Will you refer now, please, to Holmes patent No. 2,259,819, No. 12 in the brochure? I call attention, in addition to Fig. 1, to Fig. 6, which is helpful in understanding the disclosure. By reference to those figures, Mr. Coulter, will you explain what adjustments are indicated as possible, if any, in the Holmes patent just referred to?

A. Adjustments in what way? [331]

Q. With respect to the arms which hold the garage door, or the door.

A. The adjustment—there are two adjustments, as a matter of fact. You have adjustment in the pivot point with two set screws, and then you have adjustment at the end of the arm which lengthens them.

Q. You are referring now to which arm, Mr. Coulter?

A. I am referring to—let's see. 27, I believe. Well, I don't know. They give so many numbers here. It is the top arm, anyhow.

Q. The arm 27?

A. This also has an adjustment where it fastens to the door for offsetting to the side.

Q. Now, will you refer to Fig. 6 and explain, if you will, such adjustment as is possible in the arm 15 or the arm 46, as there numbered?

(Testimony of S. K. Coulter.)

A. Yes. It has the sleeve adjustment at the bottom, also with two set screws for lengthening and shortening, or whatever you want to do. The top—I couldn't tell just what that is, but I believe that is more of an angle for moving to the sideways than anything else.

Q. By reference to the set screws, you refer to the screws indicated by the character 51, is that correct?      A. Yes, sir.

Q. Would or would that not change the [332] effective length of the particular arm?

A. Yes, sir, it would. It would lengthen it or shorten it.

Q. Now, please refer to Violante patent No. 2,425,905, No. 14 in the brochure.

A. Yes, sir.

Q. Will you, Mr. Coulter, by reference to the drawings in that patent, explain such adjustments as you find?

A. You are speaking of adjustments for lengthening, and so forth, as we have been?

Q. Yes, the adjustments with respect to the arms of that hardware.

A. On Fig. 3, which is at the pivot point or is the pivot, you have an arm slotted with a washer bolt to tighten it, and a set screw in the end to move it forward or backward, allowing either way, and on Fig. 6, at the point it fastens to the door, you have another angle iron there with a pipe or—I believe it is pipe, flattened at the end, fastening to it with a slotted joint.

(Testimony of S. K. Coulter.)

Q. By the use of one or another of these slots, is it or is it not possible to change the vertical position of the door in the doorway? A. Yes, sir.

Q. Would you indicate which of the slots could be used for that purpose? [333]

A. Both could be used for that purpose.

Q. That is the slot in either end of the arm?

A. Yes, sir.

Q. And the slot in either arm?

A. Yes, sir.

Q. Now, refer, please, to Wread, patent No. 2,441,742, No. 15 in the brochure, and explain there such adjustments as you find in either or both of the arms which support the door.

A. You have two different types of hardware there. Fig. 1 is the conventional pivot type with the spring in the bottom, and Figures 2 and 3 and 4 are low headroom double pivot type.

On the Fig. 1, it would be a sleeved arm, one piece of pipe sleeved into another with a set screw for adjustment for length.

Q. And with respect to Fig. 2?

A. It is the same on both arms.

Q. That is, the length of both arms can be changed by sliding one telescoping member in the other? A. Yes, sir.

Q. Would or would not that be effective in changing the vertical position of the door in the doorway? A. Yes, sir.

Q. Could you use either arm to do that? [334]

A. Yes, sir.

(Testimony of S. K. Coulter.)

Q. Will you now refer briefly, Mr. Coulter, to Smith patent No. 2,569,351, which is not in the brochure, but which was introduced separately yesterday, and explain what adjustment is there that you find?

A. You are speaking yet of adjustment of the vertical position of the door?

Q. That is correct.

A. The slot in the pivot bracket itself which allows the b arm, as we call it, to be raised or lowered to cause the door to be vertical in the opening.

Q. And that changes the effective length of the cantilever arm, does it not?

A. It affects the—it raises the arm in the pivot position—or in the pivot bracket.

Q. Now, will you lay before you, Mr. Coulter, the Fowler patent in suit? I suggest that you might refer to the photostat we have introduced. I call attention to the figure 1 of the Fowler patent on the right-hand side, and the Tavart illustration next, to the left of that, and the Coffey illustration next on the left. Will you count, please, Mr. Coulter, the number of parts and the holes, the hole operations, in the Fowler patent? Do you have a notation of that?

A. Well, offhand, the exact—you are guessing at [335] some points as to what type of connection is being used, three different types could be used, but on the Fowler patent you have approximately 40 different parts.

Q. That is counting parts and holes necessary?

(Testimony of S. K. Coulter.)

A. Bolts and washers and everything.

Q. And in general those parts constitute what kinds of structure?

A. What was that again?

Q. Nuts, bolts, washers, or what?

A. Well, there is for your pivots and your assembly of the entire hardware, rivets or fastening the different points together, you have your pivot bolts and your spring fastenings—I don't believe you see figured the spring fastening in that at all. You have your bolts for your connecting arm, and washers, figuring they would use a washer on it and a bolt on the other side, a lock and a washer and a nut on two different sides—in others words, double that.

Q. By way of comparison, how many corresponding parts did you count in the Tavart?

A. 24, approximately, on this particular picture you have here.

Q. And in the Coffey type, as nearly as you could count it from what would have to be there to make it work, how many parts did you find?

A. 26. [336]

Q. I believe you said first that there were 40 in the Fowler.      A. That's right.

Q. May I refer you now, Mr. Coulter, to Plaintiff's Exhibit 4 for identification, which is the claims of the patent in suit? Referring first to the Fowler disclosure, which is on the right of that photostat sheet, which I believe we will find shows all of the elements recited in the claim, and taking

(Testimony of S. K. Coulter.)

claim 1 by way of example, I read, as tabulated by plaintiff:

“A bracket (11) for mounting to the door frame.”

You find that, I believe.           A. Yes.

Q. “A master arm (12) pivotally mounted intermediate the ends thereof to said bracket.”

You find that?           A. Yes, sir.

Q. “c) Means for pivotally connecting one end of said arm (12) to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame.”

You find that?           A. Yes. [337]

Q. “d) A link (14) of adjustable length.”

Do you find that?           A. Yes.

Q. “e) A pivot pin pivotally connecting”——

Mr. Fulwider: I didn't catch it. Where is he finding these things? In the Fowler drawing?

The Witness: In Fowler.

Mr. Beehler: In Fig. 1 of the Fowler drawing.

Mr. Fulwider: Fine. Thank you.

Q. (By Mr. Beehler): “e) A pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket.”

Do you find that?           A. Yes, sir.

Q. “f) Means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the

(Testimony of S. K. Coulter.)

pivotal connection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions.”

Do you find that?           A. Yes, sir.

Q. “g) Means (slots 14c and pins 15) for [338] adjusting the length of said link while the afore-said intermediate portion of the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame.”

Do you find that?           A. Yes, sir.

Q. “h) And means including a tension spring (17) for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Do you find that?

A. Spring 17? It must be the bracket connecting the spring.

Q. I think you will find a reference character 17 to a little fragment of a spring.

A. That is the spring itself.

Q. Yes.           A. But this is the connection.

Q. The notation of Exhibit 4 shows 17 in parentheses.

A. 17 is the spring itself, if that is what they have reference to there.

Q. All right. Now, going back to item a and having reference now to the Tavart illustration and Winchel and Coffey illustrations, I read again:

“a) A bracket for mounting to the door [339] frame.”

(Testimony of S. K. Coulter.)

Do you find that on the other illustrations?

A. Yes, sir.

Q. "b) A master arm pivotally mounted intermediate the ends thereof to said bracket."

Do you find that on those? A. Yes.

Q. "c) Means for pivotally connecting one end of said arm to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame."

Do you find that? A. Yes, sir.

Q. Do you find that on the others?

A. Yes, sir.

Q. "d) A link of adjustable length."

Do you find that on the others?

A. We find—it varies a little, but we find it in the same results. It is not the same.

Q. Will you explain that statement, Mr. Coulter?

A. Well, that particular question leads into the next one, which shows a different hook-up as to your bracket here. This particular one adjusts in the center.

Q. "This particular one"?

A. 14 of the Fowler patent. [340]

Q. Fowler?

A. Yes, Fowler, while Tavart adjusts at the top end in the pivot bracket itself, and also the Coffey, but from the other references, not by this picture, but by other references, it does the same.

The Winchel adjusts at the bottom of the arm on the angle that fastens to the door.



(Testimony of S. K. Coulter.)

Q. Now, then, you have referred to an explanation of parts d and e of the patent claim tabulation, I believe.

Now, referring to item F:

“Means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal connection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions.”

Do you find that in the others of the illustrations?

A. The pivot point would be the same—yes, the same all the way through. On the Winchel, the pivot point would be the same, even though the gusset plate would move.

Q. Now, refer to item g:

“Means for adjusting the length of said link while the aforesaid intermediate portion of [341] the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame.”

Do you find that in all of the other illustrations?

A. Well, as I stated a few moments ago, the adjustment would be different, because 14c and 15 are here, while in the Tavart and the Coffey, it would be in the bracket itself at the top end, and in the Winchel at the bottom where it fastens to the angle of the door.

Q. Is it or is it not true that the purpose of all

(Testimony of S. K. Coulter.)

these adjustments is to cause the door to lie in a vertical plane within the door frame?

A. Yes, sir.

Q. Referring to item h:

“And means including a tension spring for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Do you find that in all of the others?

A. I believe that is a little bit confusing there. We said it was a spring a little bit ago. I believe it is the fastener on the end of the arm we have reference to, and they all do have means for fastening to the end of the arm.

Q. And they all have a tension spring?

A. That's right, they all have a tension [342] spring.

Q. And is it true, also, of them, all four illustrated here, there is some means or other for changing the tension of the spring?      A. Yes, sir.

Q. Will you explain briefly, Mr. Coulter, what there is in the initial construction of a door or the initial construction of a building which makes some adjustment advisable?

A. You are speaking of the jamb type hardware?

Q. Of the jamb type hardware particularly.

A. Well, your doors are built different thicknesses. Again, though, we wouldn't say it is a must, because it wouldn't have to be a must. If the doors and the jambs were built so that they were identical,

(Testimony of S. K. Coulter.)

level on the back side, a hardware could be built which does not take an adjustment to it, as far as your adjustment forward and backward, but each individual one would have to be built identical. Otherwise than that and difference in the thickness in the door and thickness of the jamb, we have to have some way to compensate for it.

Q. I call your attention now, Mr. Coulter, to Plaintiff's Exhibit 10 for identification, I believe, "Economo-Jamb Instruction Sheet," and with reference to item No. 1 on that figure, I read this legend:

"Thickness of door. The distance T from the inner face of the hardware to the inner face [343] of the jamb should not be more or less than one-half inch the thickness of the door."

Does that instruction apply equally well to all of the types of jamb hardware that you have had reference to here?      A. Yes.

Q. Now, reading from item No. 2, well, rather, reading further on the bottom of item No. 1:

"Measure down on jamb  $20\frac{1}{4}$ " plus door thickness from the lower face of the header and mark this position with a square. This will locate the upper edge of the bracket."

Does that have reference to all of this type hardware?

A. Well, they wouldn't have the same measurements. It depends on your bracket and the length of your power arm, and so forth. That would vary with different hardware.

(Testimony of S. K. Coulter.)

Q. Would it vary, also, with the size of the door to be hung?

A. Yes, sir, the height of the door.

Q. The height of the door? A. Yes.

Q. Turning now to item No. 2 on the exhibit, I read this legend:

“With  $\frac{3}{8}$ ” lag screws, bolt the bracket in [344] place with its front face even with the face of the jamb and with its upper edge  $20\frac{1}{4}$ ” plus door thickness down from the header. Repeat this operation with the bracket on opposite jamb.”

That is true of all the types?

A. Except for the difference in measurements, they would be similar. This particular type could have been a little more offset. I don't remember exactly for sure now what that was.

Q. By “this one,” you refer to the Coffey?

A. The Coffey one could have been in a little further.

Q. Reading from the legend on the bottom of illustration No. 3:

“Place the door in the opening. Shim beneath the door  $\frac{1}{4}$ ”. Now swing the power arms toward the door so as to bring the angles into engagement with the vertical frame members at the edges of the door and bolt these angles to the door with the short  $\frac{5}{16}$ ” lag screws. The edges of the angles should be  $\frac{3}{8}$ ” in from the edge of the door.”

Would that be true of all the different types?

A. It would be similar. The variation from the

(Testimony of S. K. Coulter.)

edge of the door might vary on them, but otherwise they would be [345] the same.

Q. If the variation were anything, would it not be a fraction of an inch?

A. It would be part of an inch, yes.

Q. "Next, connect the loose cantilever arms with  $\frac{3}{8}$ " carriage bolts as shown in secondary view."

Do you find that in the others or any counter-part of it? A. Which arm is it?

Q. The secondary arm.

A. Fixed where, now?

Q. I will read it again.

"Next, connect the loose cantilever arms with  $\frac{3}{8}$ " carriage bolts as shown in secondary view."

A. Well, you wouldn't have that same set-up in the other hardware. You wouldn't have a carriage bolt to fasten in any of them. It would be a pivot bolt in this one. This one would be a pivot bolt and the Winchel model could have carriage bolts.

Q. No. 4, reading:

"When both edges of the door have been secured to the hardware, swing the door up into raised position. Then place power equalizer on power arm. For sequence of assembly, refer to [346] inset."

Do you find that in the others?

A. They would be all very similar. The difference would be in your type of fastener, would be all. Otherwise, it has the same results on all of them.

(Testimony of S. K. Coulter.)

Q. By "type of fastener," you mean how the spring is fastened to the power arm?

A. To the power arm, that's right.

Q. Now, referring to No. 5 of the exhibit:

"Install spring by connecting top with 'S' hook through lower hole in power equalizer and by connecting bottom with chain and lag screw assembly; position of lag screw is determined by stretching spring approximately 2"."

A. It would vary on the Tavart and the Winchel. They are fastened with a pin at the bottom while the Coffey has a bracket there on the top. It is a different fastener, but it is the same results, we will say. It is a different type fastener pin.

Q. Referring again to the bottom of the page of this Exhibit 10, on the lower left-hand side, I read:

"Note: It is necessary to keep same tension on springs at all times, therefore, if bolt is moved up arm, then extra links should be used [347] in chain at bottom of spring and vice versa."

Would that be true under all circumstances illustrated here? A. Yes, sir.

Q. Among these different schemes of adjusting the door in vertical position, do you have any preference for one over another in actual practice, from the door hanger's point of view, I mean?

A. I have no preference. We use the Tavart hardware mostly but, offhand, I wouldn't say there was a preference to any of them.

(Testimony of S. K. Coulter.)

Q. Do you find any one easier to adjust than any one of the others in your practice?

A. Well, the Tavart and the Coffey would take one bolt where the other two took two. There would be some preference there. Naturally, if you can use one instead of two, there is a preference.

Q. One on each side?

A. Yes, sir, that's right.

Q. Then there would be a corresponding doubling up on the opposite piece of hardware on the other side of the door?           A. Yes, sir. [348]

\* \* \*

Cross-Examination

By Mr. Fulwider:

Q. Mr. Coulter, I believe yesterday you said that you had had experience in installing a number of different kinds of hardware?           A. Yes, sir.

Q. I won't list them all here. I ask you this question, however: Do any of them have what has been referred to as a two-piece cantilever arm except the Sturdee? By two-piece, I mean the arm whose length can be changed similar to the Sturdee which we have been talking about?

A. In jamb type hardware, no.

Q. In jamb type hardware, that's right.

A. No, sir.

Q. Now, on this matter of tolerance, I think you said that you needed rather close tolerance, particularly for jamb type. Is that about  $\frac{1}{8}$  of an inch? [349]           A. That's right.

(Testimony of S. K. Coulter.)

Q. What is that?

A. If you drop your brackets on your arm that much or more, you get a door that tips in, or vice versa, tips out, which will run the water inside the garage or looks bad, either way, so it is quite essential. In fact, we have found that in all our work, pivot and all, that close tolerance is necessary.

Q. That is, a small change in that pivot distance makes, as I understand, a relatively larger change in the position of the door itself, say the eighth of an inch, the maximum tolerance you mentioned, that much difference at the bracket might make a difference of an inch or maybe a half inch?

A. It makes quite a bit of difference, and, also, if you make it an eighth of an inch on one side and an eighth of an inch on the other side, you get a quarter of an inch, and that doubles up eventually in your actual operation of the door and throws it off better than a half inch.

Q. I assume that for these doors to be satisfactory, they have to be able to stand fairly rough treatment?

A. Yes, sir, I would say so.

Q. A small variation or out-of-adjustment, maladjustment, in the pivot area on the bracket might result in enough change in the alignment of the door to make it unsatisfactory? [350]

A. It would be off plumb, and so forth, and cause it to rub, and such things as that.

Q. As I understand your discussion this morning, in the Tavart set, this adjustability for vertical position is obtained by shifting that pivot, the upper



(Testimony of S. K. Coulter.)

pivot, or the pivot connection of the cantilever arm at the jamb bracket; that is correct?

A. Yes, sir.

Q. In the Winchel type, they obtain this vertical adjustment, shall we call it, by shifting the lower pivot point, that is the pivot point between the cantilever arm and the door itself?

A. Yes. It would amount to that because they would move the gusset plate, which would change it, that's right.

Q. And in the Sturdee type, the vertical adjustment is obtained by changing the length of the cantilever arm itself?      A. That's right.

Q. Without shifting the position of either of the pivots?      A. That's right.

Q. In the Tavart type, the upper pivot between the cantilever arm and the bracket, that is the pivot that slides in that bracket slot, that has to take the full shock, we will say, of a door being slammed, does it not? [351]

Let's ask it this way: The pivot point in any of the sets of hardware absorbs a certain amount of shock in rough treatment of the door?

A. In putting it down, none of them take the treatment, because you have your stops on the door which stop your bounce, but going up, your cantilever arm takes the rough treatment, right.

Q. That's right. In your opinion, is there any possibility that that slot, or that slot and pivot connection in the Tavart slot and pivot connection at

(Testimony of S. K. Coulter.)

the bracket, might get out of adjustment with very rough treatment, a hard upper bang?

A. Yes, it could be. That could work loose, as far as that is concerned.

Q. And if they do get out of adjustment, then, of course, that changes the adjustment of the door itself?

A. It changes the perpendicular of the door.

Q. Yes.

A. In fact, it will not only do that, but usually they just fly back and forth.

Q. In your experience, have you ever had any of those doors go out of adjustment from any such treatment?

A. I don't know whether you would call it rough treatment. As a general rule, you find that something happens, they have not been properly tightened or somebody else [352] has fooled with them, and then they are not tightened tight enough, and then they are loose, and they move up and down in the slot.

Q. The Winchel type hardware, as I understand it, according to the testimony of Mr. Winchel here the other day, and I believe the exhibits show it, has a horizontal slot there in his jamb bracket where his upper pivot hooks on. Will you examine that? I might show you one of the exhibits here.

A. Yes, I have—

Q. Will you look at one of these exhibits? This Exhibit G shows it very well, which is one of Winchel's hardware. He has a horizontal slot, which

(Testimony of S. K. Coulter.)

has been numbered 15 here in this Exhibit G. You are familiar with that, are you?

A. Well, yes, we have used some of them.

Q. Now, what function, if any, does that horizontal slot have?

A. It would give you a certain amount, not as much as the vertical slot, but it would give you a certain amount of change in the position of your door, but very little. It isn't used—Winchel has used that more recently. Otherwise than that, I personally haven't thought too much of it, if you want the truth.

Q. In other words, in your opinion, it didn't do much? [353]           A. No. That's right.

Q. I believe he stated here the other day that he still uses that horizontal slot in all of his hardware, so the illustration of Winchel in your Exhibit V, that big photostat, which is illustrated in Fig. 4 towards the left, that pivot point which has the numeral 10 on it should show, then, a small horizontal slot at 10 to be accurate, should it not?

A. Will you repeat that again?

Q. Fig. 4 in your big Exhibit V, which illustrates the Winchel—           A. Yes.

Q. —that pivot point shown in the red cantilever arm to the yellow jamb bracket, which has a numeral 10 attached to it, there should be a small horizontal slot there, should there not, to have that illustration be accurate?

A. If this particular hardware did have a slot, yes, it should be. I couldn't say yes or no on that,

(Testimony of S. K. Coulter.)

because I wouldn't know. I wouldn't know but what they made some without it. I can't answer that.

Q. You don't know whether all of their hardware has had a horizontal slot or not?

A. No, absolutely not. I couldn't possibly know.

Q. Do you recall whether or not you have seen any Winchel hardware without the horizontal [354] slot?

A. I bought—it has been quite some time ago, and the hardware was considerably different than this, we will say. At one time I bought it and it didn't have a horizontal slot. I am quite sure of that. It was a jamb type, but considerably different.

Q. Quite different from this figure 4?

A. Yes.

Q. Did you prepare this Exhibit V, by the way, this photostat, that is the big photostat?

A. No, I didn't prepare it personally. It was made up from pictures that I had seen.

Q. Do you know who did prepare it?

A. I can't answer that, no.

Q. It was just given to you to look at?

A. I was showed the pictures, the pictures it was taken from, as I think I was asked.

Q. Now, referring again to this photostat, Exhibit V, I wasn't entirely clear on all these 40 parts, or the significance of that. Did I understand you correctly that you count the holes as parts, that is, you add the hole to get 40?

A. No. Rivets, bolts, nuts, washers, and so forth. That was approximately what it was, and it wasn't

(Testimony of S. K. Coulter.)

definitely taken apart, but it was approximate, as I testified.

Q. There was some definite, tangible piece of material? [355]           A. A definite piece, yes.

Q. And you followed the same system with these others, I believe?           A. Yes.

Q. And you count washers as a separate part?

A. Washers, that's right.

Q. By the way, was that 40 parts on just one-half of a set?           A. One-half, that's right.

Q. A half of a set?           A. Yes.

Q. And it was the same in the others?

A. Yes.

Q. If you will refer to that claim outline, Exhibit 4, which you were looking at a while ago—

A. Yes, sir.

Q. —I believe in discussing the elements D and E, you pointed out that you did not find in any of these other types shown in this Exhibit V, the photostat, a link of adjustable length, that you mentioned that the Sturdee set, all of the sets were capable of slight vertical adjustment of the door?

A. Yes, sir.

Q. So that it boils down to this, that Tavart does [356] it one way and Winchel does it another and Sturdee does it another?

A. Well—yes, sir, that's right.

Q. They are all different?

A. That's right, they are all different.

Q. Different approaches to the same problem?

A. That's right.

(Testimony of S. K. Coulter.)

Q. In discussing that Econo-Jamb instruction sheet, I think you pointed out that the Tavart was a little simpler, perhaps, because it had a single bolt for connecting the cantilever arm to the bracket, and for effecting the adjustment, whereas Sturdee had the two bolts. A. That's right.

Q. For checking that adjustment?

A. That's right.

Q. That is, the change of his arm length?

A. That's right.

Q. By the same token, I imagine the Sturdee is a little sturdier, isn't it, by reason of having two bolts instead of one?

A. That would be a natural supposition, yes.

Q. By overlapping those arms, those cantilever arm sections, you get increased stiffness in the center portion, don't you? That is, you have several inches of overlap of those two ends that are bolted together by a couple of bolts, [357] so that gives you a little more stiffness in the center section?

A. Yes, it would. It would be a little stiffer.

Q. These various patents you refer to, all of those patents which are a part of Exhibit U, that is in the book of patents, U-5, U-9, U-10, U-12, U-14 and U-15, that is, Wolf, Holmes, Peck, Holmes, Violante and Wread, those are the ones you discussed, all of those are pivot type hardware, are they not? A. That's right.

Q. And pivot type hardware as such is considered in the trade to be quite different, is it not, from jamb type hardware?

(Testimony of S. K. Coulter.)

A. Well, yes. It is a different type of hardware. It hangs on the wall. Some types of these have double pivot, which would be the equivalent of jamb type.

Q. In the trade, when you speak of pivot type hardware, you mean a particular class?

A. That's right.

Q. As illustrated by these patents?

A. That's right.

Q. And when you speak of jamb hardware, you have in mind a different type, such as indicated by the exhibits here in court?

A. That's right. That is where they get their name. [358]

Q. Because it fastens onto the jamb?

A. That's right.

Q. In the pivot type hardware of that type, it is fastened to the side wall of the garage, is it not?

A. That's right.

Q. As distinguished from being fastened to the jamb, that is, the door opening frame?

A. I didn't get the last word.

Q. As distinguished from being attached to the jamb of the door?

A. That's right. It is fastened either to the wall, door, post, built out, or something of that kind.

Q. One of the advantages, I believe, of jamb hardware over pivot type is that you don't have to worry about the differences in distance between the jamb opening or door opening, and how far away or how close that side wall is.

(Testimony of S. K. Coulter.)

A. That's right.

Q. All of those pivot type hardware sets illustrated in the patent, and with which you are familiar, have the supporting arms on an angle, do they not, a bias, so to speak?

A. Well, we would say it this way: They are capable of being put on an angle, all of them. Without looking through them, they could be hung perpendicular, but they are capable of going on an angle, put it that way.

Q. I did not mean to lead you into a misstatement. [359]

A. That's all right.

Q. Let's assume this: The side of the wall is always faced back some distance, anywhere from a few inches to a few feet from the jamb?

A. That's right.

Q. Pivot type hardware, because it has to fasten to the wall itself or to a bracket on the wall, must of necessity have the supporting arms angle out to the sides?

A. That's right.

Q. So that they can go up and down like this?

A. Yes.

Q. Whereas a jamb type hardware, being fastened to the jamb, more or less moves in a vertical plane?

A. That's right.

Q. In the pivot style hardware where you have this off-center bias supporting situation, it is essential, of course, that you have those arms adjustable in some way so that you can locate where this pivot point goes so you can take care with one set of a



(Testimony of S. K. Coulter.)

wall six inches from the jamb or a wall that is two feet, is that correct?

A. Well, we wouldn't do it that way.

Q. How would you do it?

A. Because the door wouldn't hang properly by doing that. We would have to bring your wall out to correspond somewhere near the same distance on each side, or you would [360] have nothing but trouble.

Q. You would have to actually build the wall out?

A. That's right, or a post, or something like that.

Q. What tolerance do you have in that type?

A. Six inches is about the most we would vary.

Q. About all you would have available readily?

A. Yes.

Q. You are familiar, I believe, with the types of jamb hardware that were made, at least that were on the market here prior—well, let's say prior to the advent of present-day Tavart type in about 1945, I believe you said. Were you in the business prior to that time?      A. I was.

Q. You are familiar, then, with this—well, as a matter of fact, yes, you testified as to Exhibit C-4. Do you have that in front of you, that Coffey? It is the last photo in this Exhibit C. Do you remember that Coffey hardware?      A. Yes.

Q. An Easy jamb model?      A. Yes.

Q. This photo doesn't show any slot in the jamb bracket?      A. That's right. [361]

(Testimony of S. K. Coulter.)

Q. Let's assume for the moment that there is no slot there. If there is no slot there, then that hardware would be typical, would it not, of earlier hardware sold of the same type, that is, hardware without adjustment?

A. It would have had to have been a hardware that definitely—the jamb and the door would have had to be exactly plumb unless there was some adjustment on it.

Q. In other words, unless you had some means for adjustment, you would have to almost tailor make each set of hardware for the door?

A. Or tailor make the doors, one way or the other.

Q. Or tailor make the doors? A. Yes.

Q. In your experience, did you run into any hardware some years ago manufactured like that, where the cantilever arm or link was fastened to the side rail, but there was no means for adjustment?

A. I can't recollect any where they had one solid angle on it. We have been taking most of this off, rather than installing it.

Q. Let's refer just for a moment to that Winchel exhibit we had here a moment ago, G, I believe.

A. Yes.

Q. Where is that little blue Winchel folder? Here it is. [362]

In this Winchel type, let's forget this little tiny slot here at 15, other than that, this is typical, is it not, of several different brands of jamb hardware

(Testimony of S. K. Coulter.)

which were sold along in the early forties, where the cantilever arm or link, 13, was not anchored to the side rail, 11, but it had the separate foot plate or bracket? A. That's right.

Q. And the means for adjusting that type hardware was merely to change the position of this foot plate, 14, on the door, wasn't it?

A. Yes, to plumb it and put it right the first time.

Q. Because once you got it on, then you couldn't make any more adjustment on it?

A. You could take and plug the holes and change them, but it wasn't practical.

Q. You would have to take the screws or bolts out of your little foot bracket, 14, and shove it up and down, and then make some new holes?

A. Yes. We have hardware being built today that is the same way.

Q. Hardware built today that is like that?

A. Yes, sir.

Q. I imagine it is a practical disadvantage, isn't it, to have to try to put a new set of holes fairly close to the old set, if you get one of those out of adjustment when [363] you first put it on?

A. That's right.

Q. In your opinion, then, I gather that this type of hardware where the link is fastened to the angle iron itself, as in the Tavart and in the Sturdee, and the later Winchels, is better than this type shown here that we were just discussing?

A. You are going to get me into a complete riot

(Testimony of S. K. Coulter.)

here if I answer questions like that. We have competitors making one and then the other. I wouldn't make a statement on that at all.

Q. Well, I don't want to put you on the spot. Let's just put it this way, that the jamb type where the cantilever arm is fastened to the side rail is a little quicker and easier to install?

A. Yes, that's right.

Q. And is easier to adjust?

A. That's right.

Mr. Fulwider: I believe that's all, your Honor.

#### Redirect Examination

By Mr. Beehler:

Q. Mr. Coulter, you were asked on cross-examination, I believe, whether or not you knew of any currently manufactured item of jamb type hardware which had an adjustment [364] lever, a lever in two parts which could be extended or contracted, and your answer was no, is that correct, other than the hardware in suit?      A. That's right.

Q. Are you familiar with any currently manufactured type pivot hardware where the lever is adjustable as to length, where it is made in two parts?

A. We use a telescope pivot hardware every day where one pipe fits over the other and is set by set screws.

Q. You declined to express a preference for one type jamb hardware over the other, I notice, but

(Testimony of S. K. Coulter.)

you do install both pivot type, on the one hand, and the jamb type on the other?      A. That's right.

Q. Do you have any preference for the pivot type over the jamb type yourself?

A. I am definitely a pivot man, if that is what you want to know. We still like the pivot.

Mr. Beehler: That's all from Mr. Coulter. [365]

\* \* \*

**PAUL HALOPOFF**

called as a witness by and on behalf of the defendants herein, having been first duly sworn, was examined and testified as follows:

\* \* \*

**Direct Examination**

By Mr. Beehler:

Q. Will you tell us your business connection, Mr. Halopoff?

A. I am employed with Hally Stamping Company.

The Court: With whom?

The Witness: Hally Stamping Company.

Q. (By Mr. Beehler): That is one of the defendants here?      A. Yes.

Q. Will you tell us, Mr. Halopoff, whether or not you recognize this circular, this instruction sheet, Defendants' Exhibit E for identification?

A. Yes.

Q. State for the record, please, where you got that.

(Testimony of Paul Halopoff.)

A. I purchased a set from Scofield Manufacturing.

Q. By set, you mean a set of hardware? [366]

A. Yes. That was one of the instruction sheets in it.

Q. When did you purchase it?

A. I believe it was the first day of the trial, last——

Q. Last Thursday?

A. Last Thursday, yes.

Q. Where did you purchase it?

A. At their place of business on Otis.

Q. On Otis Street?           A. Yes.

Q. In Los Angeles?

A. I believe it is Southgate.

Q. In Southgate?           A. Yes.

Q. And this instruction sheet, did you state where that was?

A. Yes. That was in the set of hardware. This was in the set of hardware that I purchased.

Q. Was it accessible on the outside of the package?

A. No, it was in with the box of accessories that go with the hardware for installation.

Q. By accessories, you mean bolts and nuts?

A. Bolts and nuts and all the parts necessary to install [367] the hardware.

Q. Did you see any instruction sheet like that on the outside of the package?

A. No, I didn't. It was just a plain package.

The Court: The exhibit is received in evidence as Exhibit E. [368]

\* \* \*

Mr. Beehler: Before putting on the next witness, yesterday we examined Mr. Martin and had him exhibit in court certain of his records, and over last night I did make a recap of portions from his checkbook stubs so that we could avoid putting them in evidence. Rather than take the court's time by reading off the specific items, I have had a recap made of those portions which appear to have some significance. [369] I would be glad to have counsel for the plaintiff compare the recap with the original stubs, if he cares to.

\* \* \*

The Court: It may be received and marked defendants' Exhibit W. [370]

\* \* \*

Mr. Beehler: I also have here from his books certain pages which are tied to the check book stubs. He identifies them as subcontract No. 27, 28, and so on. There are many sheets, so I have had photostats made of only the sheets that are tied to the check book, which I also want to introduce in evidence.

The Court: If there is no objection, they may be introduced as Exhibit X.

\* \* \*

Mr. Beehler: The next exhibit in evidence is pages 22, 23, 24, 25, 26, 27, and 29, and also a photostat of one loose page which is not numbered ex-

pressly, but which is captioned "Earl Murphy, start July 1, regular employee."

The Court: Let's make that Exhibit X-1.

The Clerk: In evidence, your Honor? [371]

### VICTOR M. CARTER

recalled as a witness herein, having been heretofore duly sworn, was examined and testified further as follows:

\* \* \*

#### Direct Examination

By Mr. Beehler:

Q. Mr. Carter, I show you here Vimcar builders hardware [372] catalog No. 14, reading from the cover page, and refer particularly to page 28. Will you tell us, is that one of your catalogs?

A. Yes, it is.

Q. What was the date of publication of that catalog?

A. Catalog No. 14 was published during November, 1947.

Mr. Beehler: I wish to offer in evidence, and to not burden the record too much, the cover page and page 28 of catalog No. 14.

The Court: It may be received and marked Exhibit Y.

The Clerk: So marked, Defendants' Exhibit Y.

(The document referred to was received in evidence and marked Defendants' Exhibit Y.)

Mr. Fulwider: What is the page?

Mr. Beehler: Page 28.



(Testimony of Victor M. Carter.)

Q. Now, will you refer, Mr. Carter, to page 28 of the catalog, at the middle of the page, where there are items A, B, and C, and having particular reference to item B, where it says, "8" overhead clearance," there appears, "No. T1-8 single door."

I find on a recap of your invoices from Tavart, the number T1-L8. Does that or does that not mean the same item of hardware?

A. Yes, that is the same item. We just dropped the L. [373]

Q. Did the L have any significance to you, or why did you drop the L?

A. It had no significance to us.

Q. That was a Tavart designation then?

A. That's right.

Q. Does that same comment also apply to item C there, No. T1-3, which on the recap is T1-L3?

A. Yes.

Q. And the same is true of item No. T2-3, instead of T2-L3?

A. Yes.

Q. And also with respect to T2-8 instead of T2-L8?

A. Yes, sir.

Q. Those items just referred to were all items of Tavart manufacture purchased by you from Tavart long before your business association with Fowler, is that correct?

A. Yes, sir.

Q. Now, Mr. Carter, there was shown here during the first day of the trial a little table model, Plaintiff's Exhibit 3. Will you, Mr. Carter, tell us what you know about the origin of this table model illustrating a garage door hung on jamb hardware?

(Testimony of Victor M. Carter.)

A. Well, at the time we dealt with the Tavart Company, Mr. Bly supplied us with similar models free of charge with every five or six sets, I don't remember exactly, [374] one with every five or six sets that we purchased.

When we started dealing with Mr. Fowler, he didn't want to supply the models, but he assisted us in obtaining them, so we obtained, with his assistance we had the lumber part of it manufactured by a furniture factory on Avalon Boulevard, I believe in the 6,000 block, and the hardware was made by a small subcontractor on Whiteside, 4041 Whiteside Street. The silk screening on the face of it was done by the Glass Arts Company on 38th Street. The little handle was supplied by us from stock. We paid about either three and a quarter or three and a half for the total assembly, and then we had them packaged in the cartons.

Q. They were all made at your expense?

A. Yes.

Q. All at your expense?

A. Made by us, every part of it, and our own trade-mark was on the face of it, the Olympic mark.

Q. That particular model had been used by you for the sale of jamb type hardware before you made any purchases from the plaintiff here?

A. Oh, yes, much before.

Mr. Beehler: I would like to have marked for identification this circular bearing caption Olympic Jamb Type Overhead Garage Door Hardware.

(Testimony of Victor M. Carter.)

The Court: It may be marked Exhibit Z for identification. [375]

\* \* \*

Q. (By Mr. Beehler): Now, I show you, Mr. Carter, first Exhibit Z-1 for identification. Will you tell us where that originated, if you know?

A. Yes. That was made in our office.

Q. Was that made by persons in your employ or was it furnished by the plaintiff? [376]

A. No. Persons in our employ.

Q. And paid for by you?

A. Paid for by us.

Q. What is the hardware that is illustrated there? A. Jamb type hardware.

Q. Was that your hardware that you sold or hardware that the plaintiff sold?

A. Well, it was to show the jamb type hardware that we sold.

The Court: When was that made, about when?

Mr. Beehler: Well, maybe this will help.

Q. Showing you Defendants' Exhibit Z, will you compare the two pictures and tell us whether or not those are the same pictures?

A. Yes, they are exactly the same pictures, prepared by one of our people in our employ and paid for by us.

Q. And Exhibit Z illustrates what kind of hardware?

A. Olympic jamb style hardware. [377]

\* \* \*

(Testimony of Victor M. Carter.)

Cross-Examination

By Mr. Fulwider:

\* \* \*

Q. Now, what hardware does that cut Z-1 portray? You said it was made to show the hardware you sold. Was that made during the time you were buying hardware from Mr. Fowler or was it made after you stopped buying from Mr. Fowler?

A. As I said, I don't remember the dates, so I couldn't tell you that.

Q. You don't even know whether it was during the Fowler supply time or afterwards?

A. I will check the date and be glad to tell you.

Q. Do you know what hardware the hardware used in making this sketch was?

A. No, I do not.

Q. So you don't know what hardware these exhibits Z and Z-1 illustrate?

A. Oh, yes, that is Olympic hardware, jamb type hardware.

Q. Olympic jamb type hardware, but you don't know what hardware is shown here? I will put it this way. You don't know whether this hardware shown here was bought from [379] Mr. Fowler or whether it was bought from Mr. Halopoff, do you?

A. I wouldn't remember. I would have to check the date of publication.

Q. As a matter of fact, I call your attention to the shape of this jamb bracket right at the point where the master arm fastens on, and ask you if

(Testimony of Victor M. Carter.)

it is not a fact that that is a correct portrayal of the hardware sold to you by Mr. Fowler, and also sold by him as Econo-Jamb?

A. Whether this is what?

Q. Doesn't that illustrate Sturdee hardware?

A. Well, I wouldn't say for sure.

Q. In other words, you don't know for sure?

A. Not in a technical way.

\* \* \*

Mr. Beehler: May I suggest that the witness has said it is Olympic hardware. I offer both exhibits in evidence as an illustration of the Olympic hardware. [380]

\* \* \*

Q. Now, with that foundation, will you compare this portrayal of a jamb bracket here in your Exhibit Z with this jamb bracket here? Let me turn this around.

A. May I see the other jamb bracket?

Q. Yes. I will put this one at the same angle, and this one the same. Now, will you compare the two sets of hardware, Exhibits 2 and 5, with the illustration of the jamb bracket shown in your Exhibit Z, and tell me in your opinion which of these two sets that cut illustrates?

A. Well, actually, it looks more like this one, but it seems to be a little rounded, whereas this one seems to be more straight.

Q. It is a little rounded like this, referring to Exhibit 2?

A. But this one seems to be projected up.

(Testimony of Victor M. Carter.)

Q. By "this one," you mean the picture——

A. The picture shown here.

Q. That this seems to be higher at the pivot point. [382]

\* \* \*

Q. Having reference, again, Mr. Carter, to Exhibits Z and Z-1, the printed SM 213 flier and wash drawing, will you tell us as near as you can when those were prepared?

A. It was sometime during '49.

Q. And you found that out from your office over the noon hour? A. Yes, I did.

Mr. Beehler: I offer them in evidence as Defendants' Exhibits respectively Z and Z-1.

The Court: They may be received and marked Exhibits Z [386] and Z-1.

\* \* \*

Mr. Beehler: I wish also to offer in evidence the photostat which we have talked from in Mr. Coulter's testimony, Exhibit V for identification, as Exhibit V.

The Court: What was that, Exhibit B?

Mr. Beehler: Exhibit V.

The Court: It may be received.

\* \* \*

### Cross-Examination

By Mr. Fulwider:

Q. Mr. Carter, you don't know when in 1949 Exhibits Z and Z-1 were prepared?

(Testimony of Victor M. Carter.)

A. No, I do not. As a matter of fact, our man is trying to pin down the date closer right now. I called him, [387] thinking that he might have it, but he does not have it. It was in '49.

Q. Can you tell us when Exhibit Z-1 was first distributed to the trade?

A. That is what we are trying to get the information. It was sometime in '49.

\* \* \*

### CARVEL MOORE

recalled as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified, in rebuttal, as follows:

#### Direct Examination

By Mr. Fulwider:

Q. Mr. Moore, I show you here a blueprint, Defendants' Exhibit P, and ask you to examine that and can you tell us or can you identify that drawing and tell me anything about it?

A. Yes, I made the drawing after conference with Mr. Fowler. [388]

\* \* \*

Q. Looking at the drawing, I call your attention to the fact that the date is 9-1-48, and the number is 491. Can you tell me whether or not that drawing was made on that date that it bears, and whether or not the number 491 has anything to do with it?

(Testimony of Carvel Moore.)

A. Yes. It has been pointed out that the date is in error on it. [389]

\* \* \*

Q. That Exhibit 24, those are invoices issued by your [390] office, I take it? A. Yes, sir.

Q. And that particular invoice you are reading, is that an invoice sent by you to Mr. Fowler?

A. Yes.

Q. What is the second item on that invoice?

A. Photographs of Econo-jamb Hardware for use by Vimcar Company.

Q. Did that have any relation to the photographs you previously mentioned? A. Yes.

Q. Are those the photographs that you testified the other day that you made for delivery, and I believe you did send a set to Vimcar?

A. That is correct.

Mr. Beehler: May we have the exhibit numbers of those photographs, if they are in evidence?

Mr. Fulwider: That is 22, I believe. Yes, 22-A, -B and -C. I had better show these to the witness.

Q. (By Mr. Fulwider): Exhibits 22-A, -B and -C are the photographs which you testified about the other day. Are those the photographs or some of them, at least, referred to in this invoice 4926?

A. That's correct.

The Court: May I ask this witness a [391] question?

Mr. Fulwider: Yes, your Honor.

The Court: This date on this blueprint, I suppose that is the date it was made?



(Testimony of Carvel Moore.)

The Witness: No. "49" indicates the year 1949.

The Court: All right. You have got it dated 9-1-48. I suppose that 9-1 is the correct date?

The Witness: Well, the date seems to be in error, your Honor. Why it is, I don't know.

The Court: Do you mean to say the date—let's forget the year '48 or '49, you have got "9-1," doesn't that indicate the date that the drawing was made?

The Witness: It could have indicated the date that it was completed or a change made on it. Maybe the date hadn't been entered at the time—

The Court: The reason I want to know is because your invoice is in August, before the date of this drawing. Why would you send an invoice for the drawing before it was made, if you did?

The Witness: We may not have sent the drawing prior to the time that it was invoiced. Sometimes these drawings go on a discussion stage. I may have invoiced Mr. Fowler at the end of August, but the drawing could have been printed up the first part of September.

The Court: How long have you been engaged in this business? [392]

The Witness: Approximately 11 years.

The Court: Have you ever made a mistake on the date before?

The Witness: I imagine I have made mistakes.

The Court: Draftsmen don't usually make mistakes, do they?

The Witness: Yes, there are quite a few mis-

(Testimony of Carvel Moore.)

takes made, and that is why checkers are used, to catch dates, dimensional errors.

The Court: Was this checked?

The Witness: No, there is no check on it. It was strictly a sales approach to the thing.

The Court: Then your testimony is that all the date is wrong, 9-1-48 is entirely wrong?

The Witness: Yes.

The Court: Your testimony is that you made it sometime in '49?

The Witness: Yes, sir.

The Court: And you have no way of telling me when it was made?

The Witness: No way other than by proof of the invoice.

The Court: I assume that was made prior to the invoice?

The Witness: That is correct.

The Court: How much prior?

The Witness: I would say normally during the month prior [393] to the invoicing.

\* \* \*

The Court: Do you have any independent recollection when [394] this drawing was delivered?

The Witness: No, sir. As I recall, the vellum was given to Mr. Fowler. I had no license to contact Vimcar.

The Court: You didn't deliver it by mail?

The Witness: No.

The Court: You delivered it personally?

The Witness: Personally.

(Testimony of Carvel Moore.)

The Court: You don't know when that was?

The Witness: No, sir.

The Court: Without referring to your records?

The Witness: I would have no record of the delivery.

The Court: Do you have any record showing when it was ordered?

The Witness: No. Most of this is ordered in discussion with a client. We have a conversation or discussion possibly once or twice a week, either over the phone or in person.

The Court: You don't have an order book?

The Witness: No. I mean Mr. Fowler has not issued purchase orders to me on most of this type of work. Some of it is done on a retainer basis.

The Court: Where do you get your information as to what to draw, what to prepare?

The Witness: Off of a sample set of hardware. I take it home or to the office.

Mr. Beehler: We can't hear the witness. [395]

The Witness: I take it off of the sample set of hardware.

The Court: Do you remember who gave you the sample?

The Witness: Mr. Fowler. When he gave it to me?

The Court: Now, do you remember when he gave it to you?

The Witness: No, sir, I wouldn't have a date.

\* \* \*

Q. (By Mr. Fulwider): You did the art work,

(Testimony of Carvel Moore.)

I believe you said, on Mr. Fowler's Econo-jamb and Deluxe instruction sheets?

A. That is correct.

Q. Will you refer to some of the other invoices in this group, Exhibit 24, and point out the invoices there, if any, that have to do with that art work for those instruction sheets?

A. Invoice 496 on February 22, 1949, was for the Revolutionary Econo-jamb. That was a four-page folder advertising piece.

Q. Do you know whether or not that was the first folder of that type that you made on the Econo-jamb?

A. Yes. Invoice No. 495 was the invoice for the original art work for the Econo-jamb instruction sheet.

Q. That is the instruction sheet that you testified about here the other day, that is, Plaintiff's Exhibit 10? Is that the one that you think that invoice refers to?

A. Yes. [396]

Q. Is there one about Deluxe instruction sheets?

A. Invoice No. 498, March 14, 1949.

Q. Is there any substantial difference between the Deluxe and the Econo-jamb that you know of?

A. The substantial difference is in the shape of the jamb bracket, the power arm is a channel instead of a flat bar.

Q. They each have a two-piece cantilever arm?

A. Yes.

Q. Are there other invoices that have any significance?

A. No.

(Testimony of Carvel Moore.)

Q. I believe you testified the other day that you have been doing advertising work for Mr. Fowler for several years. Did you do any art work on a previous set of hardware of his called Lo-Head?

A. Yes, a small folder was prepared for Lo-Head.

Mr. Fulwider: May this be marked Exhibit 25?

The Clerk: Exhibit 25 for identification.

(The document referred to was marked Plaintiff's Exhibit 25, for identification.)

Q. (By Mr. Fulwider): I call your attention to Exhibit 25, which I might state for the record was Exhibit 5 in Mr. Fowler's deposition, which is in evidence as a defendants' exhibit. Did you prepare the art work on this Exhibit 25?

A. Yes. [397]

Q. Will you tell me whether or not this illustration on page 1 is a photograph or a line drawing?

A. It is a line drawing.

Q. And did you make it? A. Yes.

Q. And did you make these drawings on the inside? A. Yes.

Q. Do you have any recollection as to about when that was made, Exhibit 25?

A. I have no accurate date for recalling that, no.

Mr. Fulwider: We will offer that in evidence, your Honor, merely to show an earlier style of hardware that was manufactured by Mr. Fowler, and to complete the deposition.

The Court: It may be received as Exhibit 25.

(Testimony of Carvel Moore.)

The Clerk: So marked.

(The document referred to was marked Plaintiff's Exhibit 25, and was received in evidence.)

The Court: May I ask this witness another question while you are debating about your next question?

Mr. Fulwider: Yes, your Honor.

The Court: Those figures on the last exhibit before you, that is, the little man, did you create that or did you get that from some previous artist?

The Witness: No; I created it.

The Court: That is your creation? [398]

The Witness: Yes, sir.

The Court: Referring back again to this blueprint, Exhibit P, in looking at it I notice some figures 8-18-49, on the bottom of the blueprint; do you know what that is?

The Witness: No, sir.

The Court: Do you know whose handwriting that is?

The Witness: That is not mine.

The Court: That is not in your handwriting?

The Witness: No.

The Court: That doesn't mean anything to you at all?

The Witness: Not to me. [399]

(Testimony of Carvel Moore.)

Cross-Examination

By Mr. Goodman:

Q. Mr. Moore, did you make the original of the drawing which is Defendants' Exhibit P in evidence, on white paper?

A. Yes, on a drawing vellum.

Q. Where is that document now?

A. I believe it is in Mr. Fowler's possession.

Q. When did you see it last?

A. Approximately a month ago.

Q. Where did you see it last?

A. At his office.

Mr. Goodman: Has counsel got the white of this drawing?

Mr. Fulwider: No. I assumed last night when I finally got hold of Mr. Moore on the telephone that he had the vellum, and I just said, "Bring it." And he tells me he doesn't have it, and he thinks he brought it over to Fowler's about a month ago. Mr. Fowler says that he thinks that he has it.

I wonder if we could send over to get it. Is it sufficiently important that you want the vellum?

Mr. Goodman: I think we should have it here.

The Court: What is the vellum going to show that this blueprint doesn't show?

Mr. Goodman: Let me develop my cross-examination further. Maybe we can dispense with it.

Q. (By Mr. Goodman): Is this blueprint an exact copy of [400] the original white?

A. I believe it is, without checking the two together.

(Testimony of Carvel Moore.)

Q. Is everything on that original white paper in your handwriting?      A. Yes.

Q. And, therefore, I take it from your answer that everything on this blueprint is in your handwriting, being a counterpart thereof?

A. I would believe so, without cross-checking the two together.

The Court: I would like to make one correction. These figures 8-18-49 he has testified were not in his handwriting.

Mr. Goodman: I will exclude that. The last answer would exclude the figures in the lower right-hand portion of the document "8-18-49"?

The Witness: That's correct.

Q. (By Mr. Goodman): Now, the legends in the lower right-hand corner, were they all put on that exhibit at the same time?

A. As far as I know they were.

Q. And where did you get the information with which to make the original drawing?

A. From the sample set of hardware picked up from the client.

Q. Was that a full and complete set of hardware? [401]      A. Yes.

Q. Was it comparable to what you see here in the courtroom marked Plaintiff's Exhibit 2 in evidence?      A. Yes.

Q. Where did you first see that set of hardware?

A. Sturdee Steel Products.

Q. At the time that it was handed to you, were you given any dimensions?



(Testimony of Carvel Moore.)

A. No. I took the physical dimensions off of it.

Q. You worked out all of the dimensions which appear on this drawing? A. That's correct.

Q. How long did it take you?

A. About 12 hours.

Q. About 12 hours. At the end of that period did you have a complete drawing?

A. In its present state, yes.

Q. Including all of the detail which you have here? A. Yes.

Q. And all the measurements?

A. That is correct.

Q. When were the blueprints made?

A. I have no idea. I didn't have the blueprints made.

Q. You don't know who made them?

A. No, I don't. [402]

Q. On the original that you prepared, was this legend on the original at the time it left your possession, in the lower right-hand corner, "Details of 'Olympic' Jamb Type Hardware"?

A. That is correct.

Q. Who told you to put that legend on the original?

A. That was a result of a discussion with Mr. Fowler regarding the sales drawing. [403]

\* \* \*

Q. Where did you get your information to prepare the instructions?

A. From the sample set of hardware. There are no dimensions shown on the instruction sheet as to

(Testimony of Carvel Moore.)

the physical parts of the hardware. It is strictly a pictorial representation.

Q. I ask you to examine the instruction sheet—do you have it before you?      A. Yes.

Q. Does it not have certain dimensions?

A. It has a dimension for establishing it on the jamb, but it does not dimension the hardware itself.

Q. Where did you get those dimensions?

A. From Mr. Fowler.

Q. You didn't work those out from the item itself?      A. No.

Q. Is it the usual custom for a draftsman to prepare instructions before he prepares a blueprint, or vice versa?

A. In this instance the information being furnished by the client, and I assume he received his data from his door hangers, it was strictly in order to do it that way.

Q. When you finished the original drawing, you gave it to Mr. Fowler and you have never seen it since, I take it, is that right?

A. That is correct. [404]

Q. I believe in answer to the court's inquiry you don't recall when you delivered it to him?

A. No.

Q. Do you know what happened to the hardware that you were using when you prepared the blueprints?

A. I believe I returned it to Mr. Fowler. I had no use for it.

Q. Was it done at your place of business?

A. Yes.

(Testimony of Carvel Moore.)

Q. What is the name of your business?

A. H. Carvel Moore, Industrial Design.

Q. Does your name appear on your invoices?

A. Yes, and the address.

Q. When did you first find out that you had made a mistake in the date, on this drawing?

A. Approximately a month ago.

Q. And who called it to your attention, if anyone?

A. Mr. Smyth.

Q. Where were you at the time your attention was directed to this date?

A. I believe it was over the telephone with Mr. Smyth. [405]

\* \* \*

The Court: May I ask a question?

I understand now that you mark these invoices 1, 2, 3, 4, 5, irrespective of the client?

The Witness: That's correct.

The Court: Evidently you marked the first one "1." and then go on down through the rest of the year, is that correct?

The Witness: Yes.

The Court: Do you have any invoices before August in 1949? You mark this "491"; I assume from your testimony this is the first drawing that you made during the year.

The Witness: For Sturdee Steel, sir; not for other clients. The only thing that would differentiate between 491 on several drawings would be the title block in the lower right-hand corner.

(Testimony of Carvel Moore.)

The Court: I thought you just got through testifying regardless of the client you numbered your drawings beginning with No. 1, and on through the year, and then the next year you would start "50," begin with 1 in January and go on through to the end of the year. That is my understanding. Did I get the wrong impression?

The Witness: Maybe I can clarify it a little bit. If there are three or four clients involved, and they are all asking for an orthographic type of drawing, I may start out with 491 for each one of those. In other words, each of the four clients could have a drawing 491. The second drawing [407] that would be prepared for them during the year, for any one of them, would be 492, for each client.

The Court: You numbered these according to clients, then? I thought you just got through testifying that you didn't; that you numbered them irrespective of who they were for.

The Witness: No, sir. The invoice is numbered in consecutive order irrespective of client. The drawing, though, would go in consecutive order for each client. That is, 491, -2, -3, -4, and so forth, for each client.

The Court: Then you might have a number of clients with 491? [408]

\* \* \*

Q. (By Mr. Goodman): I take it that you have no invoices at all in your records now—not particularly here in court—showing anything that you billed for in the year '48?

(Testimony of Carvel Moore.)

A. I wouldn't verify that. However, I would be glad to check.

Q. Is there anything in your records by which you could justify the error here, anything that would give it to you in writing by Mr. Fowler?

A. No, sir.

Q. Can you explain why the error would have been in the month, as well as in the year?

A. No, I can't. [410]

\* \* \*

Q. (By Mr. Goodman): Did you do the art work on Exhibit 25? A. Yes.

Q. I believe you testified that you didn't know when you did that, is that correct?

A. That is correct.

Q. Was it prior or after February, 1949?

A. It would be prior to '49, February '49.

Q. Then you did art work for Mr. Fowler in 1948? A. Yes, I believe I did.

Q. Do you remember testifying here in the early part of last week that you had never done any work for Mr. Fowler of any kind prior to February, 1949?

Mr. Fulwider: I don't think he so testified.

Mr. Goodman: Yes, he did. I will have the record written up that his testimony was that he did no work prior to February, 1949.

The Witness: May I make a statement?

The Court: You can answer, and then explain your answer.

(Testimony of Carvel Moore.)

Q. (By Mr. Goodman): You can explain your answer.

A. I believe the original testimony on that was that I had done work for Mr. Fowler for five years. Now, the other question Mr. Beehler asked me was had I done any photographs prior to this Econo-Jamb, and my answer was no.

Q. Then your explanation is now that you were limiting [411] your answer to photographs?

A. The second part of the answer, yes. But art work had been done for five years.

Q. For five years? A. That is correct.

Q. Did you retain a copy of the drawings in your records and files? A. Of this blueprint?

Q. Yes. A. No, I have no copy of it.

Q. Of any kind? A. No.

Q. Do you recall now that you delivered this blueprint in person to Mr. Fowler?

A. The vellum was delivered in person. The original engineering drawing was delivered; not the blueprint.

Q. And when did you first see this blueprint?

A. The first print I saw was about a month ago when this was called to our attention. I didn't see a blueprint; it was a different kind of print. [412]

\* \* \*

Q. By the way, you signed the original drawings with your name "H. C. Moore"?

A. That's right. [414]

\* \* \*

JOHN K. McFADDEN

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. I call your attention, Mr. McFadden, to this Fowler patent Exhibit O, which shows the hardware or shows hardware, which has a cantilever arm 15, and it shows in this drawing some slots and bolts, then it shows an extra little arm 17, I believe. When you were testifying yesterday with respect to that drawing and with respect to the Lo-Head—I believe it was Lo-Head—hardware that was made at that time, there is some confusion in the testimony as to whether or not that hardware that was sold in 1946, while you were working for Mr. Fowler, had the cantilever arm 15 made in two pieces as it is shown here in the drawing. Would you clarify that and tell us what your viewpoint—I mean what the facts are as you understand them? [415]

A. The hardware that was made and sold, this arm was not in two pieces (indicating).

Q. By "this arm" you mean the arm 15, the one colored red here?

A. Yes.

Q. You say that was not made in two pieces?

A. It was not made in two pieces.

Q. Otherwise were there sets sold in 1946 that appear to you to be substantially identical with this drawing Exhibit O?

(Testimony of John K. McFadden.)

A. This arm was changed after it was manufactured. This was the original arm, but it was changed into a bent position.

Q. By "this arm" you mean the short arm 14?

A. Yes. It was later bent.

Q. That was later bent to form what we called the other day the boomerang type of arm?

A. Yes.

Q. We had a photo that you identified?

A. Yes.

Q. While you were working there with Mr. Fowler, did you see or do you recall whether you saw in the shop for experimental purposes, or otherwise, an arm substantially like this one, in other words, a two-piece arm?

A. We had it for experimental purposes. [416]

Q. But so far as you know, none of those were sold?      A. None of them were sold.

Mr. Fulwider: That is all, your Honor. Wait just a minute. I would like to ask one more question, perhaps.

Q. (By Mr. Fulwider): Did you do anything over the—when was it you testified last. Was it yesterday or last week? It was Friday that you were on the stand?      A. I believe so.

Q. Since your testimony, whenever it was, have you done anything or made any investigation to verify your testimony today, or to make you any more certain today than you were the other day?

A. I have.

Q. And would you tell the court what that was



(Testimony of John K. McFadden.)

and why you are just now testifying today as you are?

A. I knew where one of the first originals was installed and I went and checked it. The arm was in one piece. Then I went and checked a set that was installed later, and it was in one piece. So I was definitely wrong if I indicated that it was ever in two pieces.

Q. That is, when you say "it was ever in two pieces," you mean the hardware Fowler sold in '46 and '47, that you talked about the other day?

A. That is correct.

Mr. Fulwider: I think that covers it, your Honor. Your [417] witness, Mr. Beehler.

### Cross-Examination

By Mr. Beehler:

Q. Mr. McFadden, to whom have you talked since you testified here on behalf of the defendant?

Mr. Fulwider: I will stipulate he talked with me out in the hall.

Mr. Beehler: I am asking the witness, if you don't mind.

The Witness: I talked with the man there, speaking.

Q. (By Mr. Beehler): To whom all did you talk as among the people here in the court room now?

A. I talked to several.

Q. Will you name them, please?

A. Mr. Varley, Roscoe Fowler.

Q. Anyone else?

(Testimony of John K. McFadden.)

A. Several of the gentlemen there that I don't recall their names. I don't know their names.

Q. Did you talk to Mr. Smyth?

A. If he would stand up, I could tell. Because I don't know him by name.

(A man stood up.)

The Witness: Yes, I said a few words to him.

Q. (By Mr. Beehler): You mentioned the fact that you had looked at two pieces of the Lo-Head hardware which had been [418] installed some years ago, you say? A. Yes, sir.

Q. Did you look at any more than those two?

A. No.

Q. Where was the first of those two pieces located? A. I have the address here.

Q. Will you read it into the record, please?

A. The man's name is Lange. L-a-n-g-e is the way I would spell it.

Q. And his first name?

A. I can't tell you.

Q. Clarence? A. Clarence.

Q. What is his address?

A. 1042-66th Street, Inglewood.

Q. You know Mr. Lange is an employee of Matlin, do you not?

A. I know he has worked for him at different times.

Q. What was the name and address of the other place that you inspected?

A. Well, when I was there I didn't look at the

(Testimony of John K. McFadden.)

number, to tell you the truth. I can tell you the approximate location.

Q. May I ask who took you there?

A. I went there by myself. [419]

Q. I beg your pardon?

A. I went there by myself.

Q. What was the location?

A. It is on Figueroa Street a block and a half north of Slauson, on the west side of the street. It is Al's Trim Shop, I believe is the name of the place. I think it is Al's Trim Shop, as I remember it.

Q. What prompted you to go to that particular place?

A. My boy remembered there was a set installed there.

Q. Your boy, you say?           A. Yes.

Q. What is his name?

A. The same as mine.

Q. Was he employed by Mr. Fowler at the time that set was installed?           A. No.

Q. How did he know that the set was installed there?

A. He was working with the door hanger.

Q. With who?

A. Some door hanger at the time the set was installed.

Q. Yes? How did he happen to know that that set was installed?

A. Well, he was working with the door hanger.

Q. You mean the door hanger that hung that set?

(Testimony of John K. McFadden.)

A. Yes; that is as I understood it. [420]

Q. Is that what he told you?

A. That is what he told me.

Q. It wasn't Mr. Fowler that told you to go and visit that particular locality?

A. No, it wasn't Mr. Fowler; no, it was not.

Q. Have you ever been charged with infringement of the patent in suit owned by Mr. Fowler?

A. No.

Q. Have you ever been threatened with infringement? Have you ever been told that you were an infringer? A. No.

Q. Have you ever been threatened with infringement of the Smyth patent, which is owned by the Tavart Company? A. No.

Q. I would like to read from your direct examination, Mr. McFadden. It is on page 6 of this transcript which has been handed to us by the clerk.

That is the wrong page. Refer, please, to page 17, the very last question:

“The Court: I want to refer you to Exhibit O and call your attention to the fact that the bars No. 15 and No. 12 seem to be in two pieces, bolted in the middle.

“The Witness: This is bolted in the middle.

“The Court: That is, 15 was bolted in the [420] middle.

“The Witness: Yes, and there was two sets of holes there, one adjustment for a 7-foot door and one for an 8-foot door, but that was all.

(Testimony of John K. McFadden.)

“The Court: How about 12?”

“The Witness: This one had two holes in it, one for the 7 and one for the 8.

“The Court: When you went to work for Mr. Fowler, was the structure in that kind of condition, that is, two bars here and two pieces, or is that something that developed while you worked there?”

“The Witness: That is something that was there.

“The Court: Already there?”

“The Witness: To make the adjustment for the 7 and 8-foot doors.

“The Court: Do you know whether or not that structure was ever made and sold?”

“The Witness: Yes, it was made and sold.

“The Court: You are sure of that, are you?”

“The Witness: Yes, sir.

“The Court: On the market?”

“The Witness: Yes, sir.

“The Court: It was not for experimental purposes only?”

“The Witness: This set was made and [422] sold.

“The Court: In 1947?”

“The Witness: Yes, sir.”

The Court: Now, you have read this testimony. Do you want to ask him a question about it, or have you just read it to refresh his recollection?

Mr. Beehler: I have a little bit more here.

Q. (By Mr. Beehler): With respect to that answer, Mr. McFadden, when you made that statement that was a correct statement, was it not?

(Testimony of John K. McFadden.)

A. No, that was not the correct statement. I found out afterwards that it was not correct, and I wanted to correct it.

Q. And that is after you talked with Mr. Fowler and Mr. Varley?           A. No, sir.

Q. Did you check that before you talked with them?

A. Well, I talked to them the first day that I was here. But I didn't talk to them anything about checking this.

Q. You were called here as a witness under subpoena for the defendant, were you not?

A. I was.

Q. You didn't talk to counsel for the defendant and tell them that you had made a mistake, before your testimony here this afternoon, did you?

A. No. [423]

Mr. Beehler: No further questions.

Mr. Fulwider: I might say to the court that I told Mr. Beehler at the close of the proceedings last night that I talked to Mr. McFadden and he said he made a mistake, and we were going to call him today, so Mr. Beehler had all the opportunity he wanted to talk to Mr. McFadden.

The Court: Evidently he knew this was coming up, because he checked the testimony and had it in mind. I don't think he was caught by surprise at all. I think he had been plenty warned.

Mr. Fulwider: I might ask one question. I think you covered this.

(Testimony of John K. McFadden.)

Redirect Examination

By Mr. Fulwider:

Q. Neither I, nor Mr. Fowler, nor anyone on our side of the case, asked you to go out over the week end and check, did we?

A. No. I went on my own to check.

Q. On your own hook?           A. That's it.

Mr. Fulwider: That is all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Beehler: May I suggest one thing more? We, as [424] counsel for the defendants, did not have this testimony written up. It was handed to us this morning in court.

Mr. Fulwider: I asked the reporter to write it up, because I was so thoroughly confused. I asked him to get it to us as soon as he could so we knew exactly what he did testify to.

\* \* \*

S. G. VARLEY

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. I believe you testified before that you are the manager of Tavart Company?           A. I am.

(Testimony of S. G. Varley.)

Q. Is that Tavart Company that has manufactured Tavart hardware that we have been talking about in this trial?

A. It is the same company, yes, sir. [425]

Q. What are your duties as manager of Tavart, just generally?

A. They are just general; I do a little of everything that is indicated by managing the company.

Q. Do you have to do with the manufacturing as well as the business end of it?

A. I don't actually run the shop myself, but I watch it pretty closely.

Q. I believe you stated to us the other day that you had started Tavart in 1945. Prior to that date were you acquainted with or interested in overhead hardware?

A. I originally started in 1939, in the overhead door business.

Q. What branch of the business was it that you were engaged in in 1939?

A. That was building and installing doors, door hanger work as they call it now.

Q. In the course of that business did you have occasion to buy hardware from others?

A. I bought all my hardware. I didn't manufacture any.

Q. I wonder if you would tell us what general types of hardware were available on the market at that time?

A. Well, primarily there was a pivot type I used as manufactured by Crawford, who later changed



(Testimony of S. G. Varley.)

to Osborne. And [426] sometime later I started using hardware by Mr. Smith, which is the fore-runner of Tavart.

Q. That is the Mr. Smith who is the patentee of this Smith patent that Tavart owns?

A. Yes.

Q. What is his first name? A. Norman.

Q. That was a jamb type hardware, was it not?

A. Yes, sir.

Q. Were you acquainted along in that period of '39 to '41 with any other type of jamb hardware?

A. Well, along in I believe it was '41 there was another one came out. Towers, I believe was the name of it.

Q. Referring to Exhibit C-4, I call your attention to this particular picture of the Easy Jamb model of Coffey Hardware. Now, we can't see any slot there, so let's assume there is one. Other than that, or with that one assumption, does that illustrate the Smith type hardware that you just mentioned?

A. This particular set is a duplicate of the hardware we made in 1945.

Q. The particular one shown in that photo that has a vertical slot, although we can't see it?

A. Yes, it has one. [427]

Q. If it didn't have the slot in it, would that be similar to that early Smith that was made in '42?

A. Yes, the early Smith was the same except the cast iron bracket and all riveted together in one piece.

Mr. Beehler: I object to this line of testimony.

(Testimony of S. G. Varley.)

That is asking for a conjecture of this witness who has said he doesn't know what that was. He is just reading from the Coffey description.

The Witness: I do happen to know.

The Court: You do what?

The Witness: I happen to know what it was.

Mr. Beehler: I couldn't hear the answer.

The Witness: I happen to know what that is. I am not conjecturing.

Mr. Beehler: I still raise the objection. This is merely an illustrative drawing.

The Court: Overruled.

Q. (By Mr. Fulwider): I will ask you what this model is that I have here. Can you explain this hatrack that I have here?

A. It is just a means of mounting hardware and demonstrating it, showing it to people that don't understand it.

Q. Now, the particular hardware on here is a piece of your Tavart hardware, isn't it?

A. That is our current model, yes. [428]

Q. This early Smith, which was the forerunner, shall we say, of Tavart, which is illustrated by the Coffey photo,—would you just step down, perhaps, and using this as a prop, explain to the court or point out to the court how that original Smith was hooked up?

A. The original Smith at this point ran down farther. There is no basic difference in the hardware at all from 1945, except the length of this, it gives a slight difference to the door, but as far as

(Testimony of S. G. Varley.)

the hardware itself is concerned, this can run on down to this point approximately where it was.

Q. That is, the link or cantilever arm ran clear on down and anchored to the bottom of the side rail, instead of having this foot bracket, is that correct?

A. This is only to keep it from projecting outside the garage.

Q. You mentioned the Towers. I call your attention to Exhibit G, an early Winchel type. Will you tell us whether or not that is similar except for the little horizontal slot there at 15, with the Towers type that you mentioned?

A. Yes, this Winchel or Towers is the same. This point was moved down about 18 inches, and this angle was only two or three feet long, and there was a very short bracket.

Q. When you said "this point," you mean the point—

A. This point right here was extended right on down.

Q. The lower pivot point? [429]

A. And wasn't fastened to the rest of the hardware except by this arm.

Q. The link was fastened as shown there directly to the door, rather than the side?

A. Yes. Towers was very similar, except for the cast iron bracket.

Q. As to either of those two types that you just discussed, which we might call the early Smith type and the Towers type, or early Winchel type, in

(Testimony of S. G. Varley.)

either of those can you adjust the vertical position of the door once it has been installed?

A. Do you mean the 1939 model of Smith?

Q. That's right.

A. All these points were riveted solid. There was no adjustment at all. The back of the door had to be flush with the back of the jamb, or else we had to block out the bracket or wedge it out. We did everything trying to make it work. Due to the jambs and doors being not always straight.

Q. Why is this vertical adjustment that has been discussed here advantageous?

A. Well, it is due mainly to doors and jambs not being straight, or in a bind, and after the door is installed, quite often they will spring out at the bottom or in at the top several inches, sometimes more, sometimes less, and without this adjustment the hardware has to be taken off and rehung. [430] In the Winchel type you only had to take off about half of it, or the Towers type—

Q. You had better speak up a little bit.

A. With our adjustment you could adjust that without taking the hardware off.

Q. I was going to ask you if you would point out briefly, using this prop that we have here, how the Tavart hardware obtains adjustability of the arm here?

A. We move the center of this arm here, or this end, moving the circle about a point, we move the center of that circle down—up or down, whichever

(Testimony of S. G. Varley.)

is needed, depending on which way the door has to be moved.

Q. You say you move the center of the circle; you mean you move the pivot point on the bracket?

A. This little point may be down at the bottom of the slot or up, or in the middle. It depends where the back of the door is.

Q. That is, the upper pivot point of the cantilever arm?

A. The control arm, we call it.

Q. And if you move this pivot point upwardly in the slot in the bracket, then what happens?

A. Well, if this point is moved up, the door—the whole door will push forward and still maintain a vertical plane, if that is where it is. If you move it down, it will [431] swing this point back and pull the door back.

This adjustment is very critical. It doesn't take, usually, an eighth of an inch, or something, to make it work.

Q. Are you familiar with the Sturdee hardware sold by Mr. Fowler?      A. His current models?

Q. Current models, yes. That is what he calls the Econo-Jamb.      A. Yes.

Q. That is illustrated in the patent in suit here?

A. Yes, I am.

Q. Does the Sturdee hardware have means for adjusting the vertical position of the door?

A. Yes; they have a little different method than we do.

Q. Would you explain how the Sturdee operates?

(Testimony of S. G. Varley.)

A. They change the length of this arm by having it cut in two, and overlapping, I don't know just how they do it, I know they change the link in it, I believe there is a slot in one or both arms.

Q. By "this arm" you mean the cantilever arm?

A. Yes, this control arm (indicating).

Q. That is referring to Exhibit 2, this cantilever or control arm? A. Yes, that's right.

Q. One of which sections has slots and the other has [432] holes?

A. That's right. I say those slots let them change the length of this, which the result of changing the position of the door is the same, the same result as we get.

Q. I believe you said he gets it in a different way? A. That's right.

Q. Are there any other differences there in the **approach to the problem** followed by Tavart and the approach to the problem followed by Sturdee?

A. Our development was primarily in making hardware easy to install, to install any place. It is easy to do and easy to understand, and it does not change the path of the door. There are any number of combinations of these measurements that will make the door go up overhead, but each one gives a different action. We were shooting after a definite path for the top of the door, that is, this overhead clearance, when we developed this particular set, and we didn't want it to change every time the door had to be adjusted.

Q. Is the Sturdee hardware any simpler con-

(Testimony of S. G. Varley.)

struction than yours, would you say, or more complicated, or is there any difference?

A. In being simpler or not, I don't know, it is a matter of opinion. Neither one is very complicated.

Q. Is the Sturdee hardware any more or less likely to [433] get out of adjustment with rough treatment than your hardware, can you tell us?

A. It has two bolts holding two pieces of flat metal together. It would possibly stand a little more stress than ours. However, there is very little stress on this arm. As you can see, it is a little arm and there is very little stress or load on that. There is a possibility that it could be treated in such a way as to make ours slip, where his would be a little harder. We have not considered that important ourselves, however.

Q. As a matter of fact, you can cinch up the Sturdee arm, adjustment arm, adjustable arm, so that it will be almost impossible to have it go out of adjustment?

A. The adjustment itself, yes, could be made rather strong.

Q. By reason of the difference in construction of having two bolts there and doing the adjusting on the arm, whereas with yours you are limited to one bolt, as I understand it?

A. Yes.

Q. Which must be moveable in that slot that is adjustable, is that correct?

A. That's right, yes.

(Testimony of S. G. Varley.)

Q. Are you familiar with the Winchel type hardware that he is currently making? [434]

A. I have seen quite a few types. I think I am. I don't know which is his last.

Q. Showing you here Exhibit J of the defendants, which illustrates the Lo-9 type of Winchel hardware, are you familiar with that?

A. Yes, I have seen it.

Q. I believe he gets gets his adjustment by varying the anchor point—no, varying the position of his foot-plate 26, doesn't he?

A. He has either a slot in the angle or a slot in this little bracket. I don't know which. In the angle, I think. He moves this whole piece up or down.

Q. You can resume your seat, if you wish.

I believe that is all.

### Cross-Examination

By Mr. Beehler:

Q. Mr. Varley, when did you first come out in commercial production with this particular variety of Tavart hardware, where the cantilever arm is the short arm rather than extending clear to the end?

A. It was the first part of '49. In fact, we named it our Forty-niner model for that reason.

Q. The one that came in '49, that had a roller-bearing in it for the first time, did it not? [435]

A. No, sir. We started using a roller-bearing in '48, I think.

Q. When you had the roller bearing you had the shorter cantilever, did you?



(Testimony of S. G. Varley.)

A. No; they didn't come together.

Q. You came out with your short cantilever after Mr. Winchel came out with his short cantilever, is that correct?

A. No. We came out before he did, I am quite sure.

Q. Are you certain?

A. I had never seen a set of his similar to ours until after ours had come out.

Q. When you say you are sure, you mean merely that you didn't see it?

A. Yes.

Q. In your experimenting or designing of a jamb plate, did you ever produce and sell any hardware which had a series of separated holes for the adjustment of the end of the cantilever where it joins the plate?

A. No, sir.

Q. Is this particular variety of Tavart hardware with the short cantilever arm acceptable to the public, do you sell lots of them?

A. It seems to be, yes.

Q. Do you have any idea how many sets you have sold in the last year? [436]

A. Well, yes, I do know.

Q. Will you tell us, please?

A. I don't know exactly. I would say somewhere around fifty to sixty thousand.

Q. Referring to the old Tavart set with the long cantilever arm that came out to the end of the angle-iron, can you give us an idea of how many sets like that you sold?

A. No, I wouldn't guess at that. We ran from

(Testimony of S. G. Varley.)

thirty to sixty thousand sets a year. I would have to do a lot of checking to find out.

Q. They are substantially all still in service, are they not, you haven't changed them for new ones? A. Some of them have worn out.

Q. Other than having worn, they are still in service to the best of your knowledge?

A. As far as I know, yes.

Q. Can you identify your products by catalogue numbers, T1L3?

A. I can by our numbers, yes.

Q. Does T1L3 mean this type of hardware here before us with a short cantilever arm or your type of hardware with a long cantilever arm?

A. It was neither one. It was kind of a hybrid set that we made for a while.

Q. How did it differ from this one here before us? [437]

A. It had extra movements in it. It was more of a complicated mechanism.

Q. Where would the extra movement be?

A. It would be kind of hard for me to describe it. It was designed to get a low overhead clearance.

Q. Did it have a joint——

A. It had a joint in the main arm, and it had an extra control arm.

Q. The control arm, however, was adjustable, was it not? A. Just like this, yes.

Q. Would the T2L8 be comparable to the T1L3?

A. No. T2L8 was similar to our original hardware except for a slightly different arrangement of

(Testimony of S. G. Varley.)

the pivot points to make 8 inches overhead clearance instead of the 14 as required by the older type.

Q. When you say a different arrangement of the pivot points, will you explain how it would be different?

A. This is about the only way I can do it.

(Witness at prop.)

The position of this main pivot point and this pivot point, and the length of this arm and the length of this arm (indicating) can all be varied to any number of combinations, each one makes a different path of the door. We selected one that let the top of the door go not over 8 inches above the [438] opening when the door was open. The original hardware went—took 14 inches.

Q. That, then, would be a variation in the location of the lower slot to the location of the upper hole of jamb plate, is that correct?

A. This is known as linkage, these various pieces. The dimensions of the various linkages were changed to get that.

Q. The changing of those relative positions and adjustments was just a matter of mechanical skill, was it not?

A. Yes, that's right. You can neither try it or lay it out on a drafting board, either way.

Mr. Beehler: No further questions.

Mr. Fulwider: I have one more I would like to ask and it will be a short one.

(Testimony of S. G. Varley.)

### Redirect Examination

By Mr. Fulwider:

Q. Mr. Varley, can you tell me in your opinion the similarities and dissimilarities between pivot type hardware and jamb type? Would you say they are similar?

A. The similarities are that they both open and close a door. That is about the only similarity in them.

Q. And they both do have a pivot as they move about center? [439]

A. Yes, everything that moves I guess has to have a pivot. The pivot type has only one. It is an entirely different operation from the jamb hardware.

\* \* \*

### HAROLD E. BURTON

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Burton?

A. In the overhead door business.

Q. What phase of that business are you engaged in?

A. Manufacturing the door and [440] installation.

(Testimony of Harold E. Burton.)

Q. About how long have you been in the installing business?      A. 1932.

Q. Have you in the course of your activities in the manufacturing and installing of doors had occasion to install Tavart, Winchel, and Sturdee hardware?      A. Yes.

Q. Will you tell us which of those three brands you use the most of at the moment?

A. Winchel.

Q. Will you tell us why that is?

A. That is from a competitive standpoint, the reason we use mostly Winchel.

Q. You say it is cheaper?

A. It is cheaper and it is quicker to install.

Q. Do you ever use any Sturdee hardware?

A. Yes.

Q. Is there any particular reason or time—put it this way: When do you buy Winchel and when do you buy Sturdee?

A. We use Sturdee on our scattered jobs and our non-competitive jobs.

Q. And you use Winchel on the others?

A. On the competitive jobs.

Q. You have, however, hung Tavart hardware in times gone [441] by?

A. We have hung a lot of Tavart hardware.

Q. Have you had trouble with the Tavart hardware with the pivot bolt changing its position in response to hard usage of the door?

A. Do you mean the shoulder bolt on the plate?

Q. Yes.

(Testimony of Harold E. Burton.)

A. Yes, we have had a little trouble with his slipping.

Q. Have you ever had any similar trouble with Winchel type hardware, the foot bracket slots going out of adjustment?

A. Do you mean the slots on the angle-iron?

Q. Yes.           A. Yes.

Q. Have you had any such trouble with Sturdee type hardware?

A. Not with the slots on the cantilever arm.

Q. Do you recall that Winchel hardware has a small horizontal slot in the jamb bracket where the cantilever arm hooks on to the bracket?

A. Well, it does have.

Q. Yes. Can you tell me what the function, if any, is of that horizontal slot?

A. Well, originally they used it for a door stop, but it didn't prove satisfactory, and you can get by with a little less head room by pulling the slot all the way back. [442]

Q. I will ask you if it is a fact that the Sturdee hardware, because of the overlapping of the two parts of the cantilever link, is any stiffer than the Tavart or Winchel link?

A. Yes, it is stiffer. Anybody would be able to see that.

Q. Is that an advantage?

A. It is an advantage from a service standpoint. There is not so much call-back on it on that account.

Q. And when you said that you used a Sturdee for—I think you said isolated jobs?           A. Yes.

(Testimony of Harold E. Burton.)

Q. Was that because you don't have as much of a service problem with Sturdee as you do with the Winchel?      A. That's right.

Q. To summarize that, in your opinion from personal experience in the door-hanging business, is Sturdee Econo-Jamb hardware less likely to get out of vertical adjustment than either Winchel or Tavart?

A. From my experience it doesn't get out of adjustment as easy as the other hardware.

Q. When you see a set of garage door hardware, we ought to say overhead door hardware, having a two-piece cantilever arm with slots in one of the pieces and bolts in the other to adjust the length of the arm, what manufacturer do you think [443] of?      A. I think of Sturdee.

Q. You are familiar with both pivot and jamb type hardware, are you not?      A. Yes.

Q. Will you tell us what similarities, if any, there are between pivot and jamb, in your opinion?

A. Well, they both have a pivot and they both open the door. That is practically the only similarity that I know of.

Q. They are different types of hardware, are they?      A. Yes, definitely, I think.

Q. A pivot type is considered different from the jamb type?      A. Yes. [444]

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FORREST A. KRIEGER

called as a witness by and on behalf of the plaintiff,

in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Kreiger?

A. Garage door business, fabricating and hanging.

Q. About how long have you been in that business?      A. '46.

Q. Are you familiar with Tavart and Sturdee hardware?      A. I am.

Q. Have you used both of them?

A. I have.

Q. And you have hung both?      A. Yes.

Q. What type of hardware do you use mostly now?      A. Sturdee entirely.

Q. Have you ever had any trouble with Tavart hardware with the pivot point that fits in the slot on the bracket going out of adjustment?

A. Yes. [445]

Q. Have you ever had any trouble with Sturdee hardware going out of adjustment, that is, vertical adjustment?      A. No.

Q. When you see a set of hardware having a two-piece cantilever arm with a slot and bolt connection, do you think of any particular manufacturer?      A. I do. \* \*

Q. Who is that?      A. Sturdee.

Q. Are you familiar with pivot type hardware, as well as jamb?      A. I am.



(Testimony of Forrest A. Krieger.)

Q. Is there any similarity in your mind between pivot type hardware and jamb hardware?

A. They are two different sets of hardware. They both open the door overhead, but there is no similarity between them. [446]

\* \* \*

RALPH A. BAYLESS

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

Direct Examination

By Mr. Fulwider:

Q. What is your business, Mr. Bayless?

A. Overhead door business.

Q. Do you manufacture and install?

A. Manufacturing and installing, yes.

Q. How long have you been in that business?

A. Since '45.

Q. Have you in the course of your business hung Tavart, Winchel and Sturdee types of hardware?

A. Yes, sir.

Q. Do you use all of those or any of those now?

A. No, sir; we exclusively use Sturdee.

Q. Have you ever had any trouble with Tavart type hardware with the pivot bolt going out of adjustment?

A. Yes, sir.

Q. Can you tell us a little more about that?

A. Well, on that slotted deal, you have such a

(Testimony of Ralph A. Bayless.)

small [447] bearing surface on there that if the door is dropped hard it just slides right up to the slot and, therefore, when the customer calls you up, you have to go back and adjust it back up so they won't call you up any more.

Q. Have you had any similar troubles with the Winchel type hardware where the slot is down at the foot bracket?      A. Yes, the same trouble.

Q. You have had them go out of adjustment, too?

A. Yes.

Q. Have you had any similar trouble with any of the jobs that you have installed with Sturdee hardware?      A. No, sir.

Q. Is it a fair statement to say, then, that in your opinion the Sturdee type hardware is less likely to go out of vertical adjustment than either Tavart or Winchel?      A. Yes, sir.

Q. Being familiar with all three of those, and other types of hardware on the market, when you see a hardware with a two-piece cantilever arm joined together for adjustment do you think of any particular manufacturer?      A. Yes, sir.

Q. And who?      A. Sturdee Steel.

Q. Are you familiar with pivot type hardware, also?      A. Yes, sir. [448]

Q. And have you installed pivot type?

A. Yes.

Q. In your opinion is there any real similarity between pivot type hardware and jamb type hardware?      A. None.

Mr. Fulwider: That is all.

(Testimony of Ralph A. Bayless.)

Cross-Examination

By Mr. Beehler:

Q. Mr. Bayless, when an item of Tavart hardware goes out of adjustment and you go back to fix it, what do you do?      A. Pardon?

Mr. Beehler: Will you read it, please?

(The question was read by the reporter.)

The Witness: In most all the cases we find out that the bolt has slipped in the slot.

Q. (By Mr. Beehler): What do you do then to fix it?

A. We set the door in a vertical position and tighten it back up again.

Q. Is that an awfully hard job?

A. No; but it takes time and costs money.

Q. Suppose you screw the bolt up a little bit tighter?

A. You would probably bust it. You can only get the bolt so tight.

Q. You can get it tight enough so it won't move, though, [449] can't you?

A. No, sir, not on Tavart.

Q. Do you have a wrench in your pocket?

A. No, I am afraid I don't.

Q. Will you tell us where you found a Tavart piece of hardware that did slip?

A. An address?

Q. Yes.

A. I couldn't get that without getting my books out.

(Testimony of Ralph A. Bayless.)

Q. You don't really remember any, do you?

A. Yes, I can remember some, but not the addresses.

Q. How many have you installed in all?

A. The only ones we have ever installed is where the customer has gone to the hardware store and bought it and insisted that we use their hardware that they bought to hang their door.

Q. That is your sole experience with Tavart hardware?

A. That's right; I would say 25 or 30 of them.

Q. Is that also true of the Winchel hardware?

A. Yes.

Mr. Beehler: No further questions.

### Redirect Examination

By Mr. Fulwider:

Q. Mr. Bayless, have you ever installed Coffey hardware? [450]      A. Yes, sir.

Q. Is there any essential difference between the Coffey hardware and the Tavart hardware?

A. No, not in principle.

Q. The Coffey hardware is illustrated—I call your attention here to Exhibit V; one of these pictures says "Coffey Overhead Doors, Inc." Now, you can't see any slot here, but there has been testimony that this bracket, this jamb bracket has a vertical slot and it is similar to the Tavart. Can you tell me whether or not that is a fact?

A. That is a fact.

(Testimony of Ralph A. Bayless.)

Q. You said you had installed Coffey?

A. Yes, sir.

Q. In any substantial quantity?

A. Quite a few.

Q. About how many or over how long a period of time?

A. I would say about eight, nine hundred of them in a year.

Q. Did you have any trouble with the Coffey hardware going out of vertical adjustment?

A. Yes, sir.

Q. What did you do as a result of that?

A. Started manufacturing it myself and eliminating the slot.

Q. Later, I take it, you became a customer of Sturdee, [451] is that correct?

A. That is correct.

Mr. Fulwider: That is all.

### Recross-Examination

By Mr. Beehler:

Q. You know, don't you, Mr. Bayless, that Mr. Coffey doesn't manufacture any hardware?

A. I am speaking at the time Mr. Coffey manufactured or sold his hardware to us. That was in 1945.

Q. That was manufactured by Mr. Winchel, wasn't it?           A. Pardon?

Q. Wasn't that actually manufactured by Mr. Winchel?

(Testimony of Ralph A. Bayless.)

A. I don't know who manufactured it. Coffey sold it to us. [452]

\* \* \*

### ROY O. WALIZER

called as a witness by and on behalf of the plaintiff, in rebuttal, having been first duly sworn, was examined and testified as follows:

\* \* \*

### Direct Examination

By Mr. Fulwider:

Q. Mr. Walizer, what is your business?

A. Overhead doors.

Q. What branch of the business are you in?

A. Fabricating and installation service.

Q. How long have you been in that business?

A. Since 1945.

Q. And in your experience have you had occasion to hang Tavart, Winchel, and Sturdee—that is, doors with Tavart, Winchel, and Sturdee hardware?

A. Yes and no. I have installed Tavart and Sturdee, but no Winchel. I have seen it, but I have never installed it.

Q. Have you ever had any trouble with Tavart doors, that is, doors with Tavart hardware, going out of vertical adjustment by reason of slippage of that pivot piece? A. That's right, I have.

Q. Have you had any similar trouble with Sturdee doors [453] going out of the vertical adjust-

(Testimony of Roy O. Walizer.)

ment by reason of any slippage in the cantilever link?

A. Not since they came out with the Econo set.

Q. I should have modified my question that way. That is the two-piece link that we have seen here in court?

A. That's right.

Q. You haven't installed Winchel doors?

A. No, I never installed any Winchel.

Q. Are you sufficiently familiar with the various kinds of hardware on the market to form an opinion when you see some hardware with a two-piece cantilever arm, the two pieces held together by bolt and slots?

A. I would say it was Sturdee's. It is the one I use all the time. That is the only one I know of is Sturdee.

Q. You don't know of anyone else that is now manufacturing it?

A. I did use a couple of sets of Olympic that had that. In a bind, I would run over to Builders Emporium from Burbank to Van Nuys.

Q. Do you know whether or not Olympic was manufactured by Sturdee?

A. Yes, at that time it was.

Q. Have you seen any of the Olympic hardware recently?

A. Yes, I got a set two weeks ago.

Q. How was it constructed? [454]

A. Very similar; in fact, it was practically the same, only lighter.

Q. Did you think it was made by Sturdee?

(Testimony of Roy O. Walizer.)

A. No; I knew it wasn't.

Q. Why?

A. I know it wasn't built by Sturdee. There is no comparison. There was comparison in the cantilever arm and pattern, and everything looked the same, but it was a much lighter set of hardware.

Q. A cheaper set? A. Yes.

Q. Structurally the same? A. Yes.

Q. Have you ever hung any pivot type hardware? A. Yes, several sets.

Q. In your opinion is there any substantial similarity between pivot type hardware and jamb type hardware?

A. None at all, as far as I am concerned. [455]

\* \* \*

### ROSCOE FOWLER

called as a witness by and on behalf of the plaintiff, in rebuttal, having been previously sworn, was examined and testified as follows: [456]

\* \* \*

### Cross-Examination

By Mr. Goodman:

Q. Mr. Fowler, I direct your attention to your deposition which is in evidence in this case, taken on August 30, 1951. At page 14, commencing with line 2. I will read it into the record and you follow me as I read it, and then I will ask you a question:

“Q. Did you design it yourself?

“A. Yes, I developed it.



(Testimony of Roscoe Fowler.)

“Q. When did you go into production on that first?” A. About the same time.

“Q. And you said January, February, or March of 1949? Was that what you said?”

“A. That’s right.

“Q. Do you have here your production drawings, copies of your production drawings of that date?”

“A. We never had a production drawing.”

I direct your attention to page 15, line 19:

“Q. Do you have any records that show any drawings from which the die was made?”

“A. No. There wouldn’t be any records at all. There may, at that time, have been sketches of a few certain parts of the die, but there was [459] no complete drawing ever made.”

Were those questions asked you and did you give those answers? A. That’s right.

Q. And you have the white original drawing at your office now? A. That’s right.

\* \* \*

### Recross-Examination

By Mr. Goodman:

Q. Mr. Fowler, did you understand this question, on page 15 of your deposition, to call for a production drawing? I [460] will repeat it again:

“Q. Do you have any records that show any drawings from which the die was made?”

“A. No. There wouldn’t be any records at all.

(Testimony of Roscoe Fowler.)

There may, at that time, have been sketches of a few certain parts of the die, but there was no complete drawing ever made.”

Now, Mr. Fowler, is Defendants’ Exhibit P a complete drawing of the overhead hardware in suit? Answer yes or no.

A. That is the mystery drawing. I don’t know anything about it.

Q. Can you answer the question as to whether or not it is a complete drawing of the hardware in suit? A. I don’t know.

Q. Will you look at it?

A. I don’t believe I could study that drawing in less than a half day. If you want me to look at it, I will be glad to do it. But you certainly can’t look at a drawing with forty-some parts on it and decide if they are all——

Q. If you look at it, study it for two or three minutes, can you tell the court whether it approximately contains all of the——

A. I would say that without looking at it. [461]

\* \* \*

### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of November, A.D. 1951.

/s/ VIRGINIA K. PICKERING,

/s/ S. J. TRAINOR,

Official Reporters.

[Endorsed]: Filed August 11, 1952.

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PLAINTIFF'S EXHIBIT No. 20

VICTOR M. CARTER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Fulwider: [29\*]

\* \* \*

Q. And as I understand it, Mr. Fowler, doing business as Sturdee Steel Products Company, boxed that hardware for you and sold it to you in cartons with the name "Olympic" already on the carton, did he not? [35]

A. Yes, we purchased them with the name "Olympic" on the carton.

Q. And the cartons had instruction sheets in them?

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Victor M. Carter.)

A. You mean instruction sheets packed in the——

Q. Yes.           A. Yes, sure. [36]

\* \* \*

Q. You kept the same name? It was always Olympic [41] hardware?

A. Olympic is our name.

Q. That is your trade-mark?           A. Yes.

Q. So all the hardware you have sold, at least in the last couple of years, has been Olympic hardware?           A. Sure.

Q. You are still using "Olympic"?

A. Sure, "Olympic" is our name, yes.

Q. Do you use any other names for garage hardware besides "Olympic"?

A. No, Vimcar hardware is under the name of Olympic. [42]

\* \* \*

### JADE M. DONNER

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Fulwider: [57]

\* \* \*

Q. Do you have any personal knowledge of any advertising material, cuts, photos, or other advertising aids delivered to Vimcar by Sturdee Steel Products or Mr. Fowler?           A. No.

(Testimony of Jade M. Donner.)

Q. Did you ever see any such?

A. I don't recall whether Mr. Fowler did have any literature he supplied us or not. I don't recall.

Q. You don't know whether he supplied you with photos?

A. Are you talking about photos or cuts?

Q. Both. [73]

A. I don't recall photos. I don't quite recall any literature.

Q. Do you know whether he ever supplied you with any cuts?      A. I don't recall.

Q. Or any other material of that kind in the way of illustrations or pictures of items?      A. No.

Q. To be used to reproduce pictures of the items he was furnishing you?

A. I don't think so because all the material he had was printed with his label and we were not selling his label of merchandise, and I doubt if we had used it even if he had supplied it.

\* \* \*

Received in evidence November 8, 1951. [74]

## DEFENDANT'S EXHIBIT B

In the United States District Court, Southern  
District of California, Central Division

Civil Action No. 13002-HW

ROSCOE FOWLER,

Plaintiff,

vs.

VIMCAR SALES COMPANY, VICTOR M.  
CARTER and MORRIS J. HALOPOFF,  
Defendants.

## DEPOSITION OF ROSCOE FOWLER

the plaintiff herein, called as a witness by the defendants, pursuant to Notice hereto annexed, on Thursday, August 30, 1951, at 10 o'clock a.m. of said day, in the offices of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles 14, California, before C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California.

## Appearances:

For the Plaintiff:

MESSRS. FULWIDER &  
MATTINGLY, By  
ROBERT W. FULWIDER, ESQ.

For the Defendants:

HUEBNER, BEEHLER,  
WORREL & HERZIG, by  
VERNON D. BEEHLER, ESQ., and  
BENJAMIN J. GOODMAN, ESQ.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: Will you swear Mr. Fowler, Mr. Notary?

ROSCOE FOWLER

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Beehler:

Q. Give your full name for the record, please, Mr. Fowler.           A. Roscoe Fowler.

Q. And your address?

A. Business or residence?

Q. Well, give us your business address first.

A. 6820 Brynhurst Avenue.

Q. And your residence address?

A. 633 31st Street, Manhattan Beach.

Q. You are the patentee, are you not, of the patent in suit, No. 2,516,196?

A. If that is the number.

Q. Well, I will show you the patent (showing same to the witness).           A. Yes, I am.

Q. And you are the plaintiff in this litigation?

A. Yes.

Q. What is the name that your business goes by?

A. Sturdee Steel Products Co.

Q. And the present address of that company is the [2\*] same as you gave here a minute ago as your address?           A. Yes.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Is that a partnership, a corporation, or what form of business is it?

A. Single ownership. I am the owner.

Q. When was that business organized?

A. About 1903, I believe.

Q. Did it have the same name in 1903?

A. It was called the "Sturdee Overhead Door Company."

Q. That was in 1903?           A. Yes.

Q. Who was the owner of the business then?

A. J. E. Kendee, and Mr. Allison—I don't know his initials.

Q. What products did that company make, if you know?

A. It had door hardware and it had doors, overhead doors.

Q. Will you describe briefly what kind of overhead door hardware that company made in 1903, if you know?

A. It was the original overhead door hardware type, which was pivot type hardware. I have no idea what it looked like at that time. I have never seen any of it.

Q. When was your first acquaintance with this business, which you say was started early in 1903?

A. June of 1942, I believe—June or thereabouts. [3]

Q. What was the nature of your acquaintance with the business then? Did you buy it?

A. I bought it, yes.



Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What products were they making in 1942, when you bought it?

A. Overhead doors, hardware and doors.

Q. What kind of hardware was it?

A. It was pivot type and jamb type.

Q. Can you describe the jamb type hardware that the company was making in 1942?

A. It would be a lot easier to show you a picture of it.

Q. Well, if you have a picture I would be happy to look at it.

A. We have all the literature from away back. We had a fire about a year ago, and some of it was destroyed. It is in that first folder, I believe. I believe there is a picture of it there.

Mr. Fulwider: Is this a picture of it?

A. Not the original. I am sorry, but it looks like I haven't got the folder. I don't know what happened to it. We probably left it laying some place.

Mr. Fulwider: It is probably on your desk.

A. However, as far as the looks, there is very little difference in the looks.

Mr. Fulwider: If you don't want to go quite so far [4] back, he can probably describe it.

Mr. Beehler: Yes; I am content to do it that way, or if there are any drawings we are content with that.

The Witness: Unless you are completely familiar with the hardware, it wouldn't look a lot different.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Mr. Beehler: May we introduce this photograph as an exhibit, so that we will have something to tie our testimony to?

Mr. Fulwider: Yes.

Mr. Beehler: I offer in evidence this photograph as Defendants' Exhibit No. 1, as illustrative of jamb type garage door overhead hardware.

(Said photograph was marked Defendants' Exhibit No. 1.)

Q. (By Mr. Beehler): With reference to the hardware shown in the photograph, so that the record may be clear, was it your statement that that was the kind of hardware manufactured by Sturdee in 1942? A. Approximately, yes.

Q. Do you know the circumstances under which that photograph was taken, or what the object was of the photograph?

A. It was taken for advertising purposes.

Q. Do you recall when?

A. Approximately '44 or '45.

Q. The hardware pictured, then, in the photograph, is hardware which you manufactured in about 1944; is that [5] true? A. That's right.

Q. Was that the only kind of jamb type hardware which Sturdee was making in 1944?

A. As I remember, it is the only kind.

Q. From whom did you purchase the business when you did so in 1942? A. Mr. Kendee.

Q. Who else was associated with the business at that time?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. With the Sturdee business?

Q. With the business you purchased, yes.

A. Mr. Kendee was the only one at that time.

Q. Do you know Mr. Kendee's full name?

A. J. E. Kendee.

Q. Do you know his address?

A. Lancaster. I don't know the box. But he owns a ranch near Lancaster.

Q. Lancaster, California? A. Yes.

Q. After you purchased the business, who was associated with you, in 1942?

A. Who was associated with me?

Q. Yes. A. As a partner?

Q. Did anyone own it with you at that [6] time? A. No.

Q. Who worked for you at that time?

A. In 1942?

Q. Yes. A. Howard Wilson.

Q. Do you know his address?

A. No, I don't.

Q. What was his job with you?

A. He was office manager.

Q. Was there anyone else, in 1942, working for you? A. You mean in that business?

Q. Yes, in the Sturdee business.

A. Yes, there was employees working in the shop.

Q. Will you name those, if you can?

A. William Patterson.

Q. And his job was what?

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. Just a workman.

Q. Anyone else?           A. Clarence Lang.

Q. Lang?           A. I believe that's right.

Q. Also a workman?       A. Yes.

Q. Anyone else?

A. Well, there were probably quite a few, but I don't recall any of the rest of them. [7]

Q. Do you know the address of either William Patterson or Clarence Lang?

A. I don't know the address of Clarence Lang, but William Patterson still works for me.

Q. Clarence Lang, then, does not still work for you?       A. No.

Q. Are there any other persons still working for you who were working for you at that time?

A. No, nobody else. Well, now, my auditor. However, he is a part-time man.

Q. What is his name?

A. Vernon C. Harp.

Q. Was there any trade name applied to the jamb hardware which you made in 1942, and, if so, what was it?       A. "Sturdee."

Q. Were the goods actually marked with the "Sturdee" name stamped or otherwise applied to the goods?

A. I can't recall. There may have been a stencil mark on them.

Q. How long have you been acquainted with the overhead garage door hardware business?

A. Since 1942.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. And your acquaintance didn't antedate, then, your taking over of the business you now have?

A. No.

Q. What was your part in that business when you [8] took it over? Were you engineer or production man, or what?

A. I was the whole thing.

Q. Did you do any designing of jamb type hardware?

A. Yes. I developed all the hardware that has been developed.

Q. You have made changes in the jamb type hardware since 1942?           A. Yes.

Q. What was the first change you made from the hardware pictured in the photograph, Exhibit 1?

A. There have been so many changes that I just couldn't tell you. I truthfully don't remember.

Q. If I said "the first major change," would that help you answer the question?           A. Yes.

Q. What time was the first major change in that type of hardware made?

A. I don't know what to say about that. I believe I next purchased a hardware concern, with all patents and patterns, etc. That is the Towers Company.

Q. They were hardware manufacturers?

A. Yes, a very small company.

Q. What kind of items did they manufacture?

A. The jamb hardware alone, jamb hardware only.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. When you say "jamb hardware," do you mean a complete jamb hardware unit? [9]

A. Yes.

Q. Or just parts?

A. No—a complete unit.

Q. What did the unit look like which they manufactured?

A. Like that right there (indicating), practically the same as that.

Mr. Beehler: The witness shows us a circular captioned "Sturdee 'Easy to Lift' Overhead Garage Door Hardware," on the front page of which is pictured a garage door with a little girl standing in front of it, and then a detail picture on one side of the door showing the hardware, and further details on the inside two pages, showing separately all of the parts of the jamb hardware, the picture on page 3 of the inside of the folder—I call your attention to the fact that on page 3 the type of jamb hardware there pictured consists of a plate for attaching to the jamb at the side of the door, a main arm to an angle iron labeled "Door Support, Structural Shape," another arm captioned "Cantilever or Guide Arm," attached to the plate at one end, and also to a short angle iron labeled "Door Support Feet Structural Shape," a spring tension adjuster, consisting of a separate short strip, with many holes in it, and a long coiled spring. With respect to those items which I named, they are essentially the same items that Sturdee was also

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

manufacturing at that time, is that not true, as pictured [10] in Defendants' Exhibit 1?

A. No, that isn't right. I showed you a picture. That is approximately the hardware I bought. Those other items you were looking at were improvements.

Mr. Beehler: The witness refers now to the front page in this circular, which I offer in evidence as Defendants' Exhibit No. 2.

(Said circular was marked Defendants' Exhibit No. 2.)

Q. (By Mr. Beehler): Now, Mr. Fowler, when you mentioned "improvements," those were the items which I enumerated on page 3, I believe you said, of that circular? A. Yes.

Q. When were those improvements made?

A. It would be impossible for me to tell you when those improvements were made. There were several of them there, and, as time went on, the improvements were built into the hardware.

Q. What was the date of that circular you showed me, Defendants' Exhibit No. 2?

A. I can't tell you that.

Q. Was it as early as 1944?

A. Oh, it would be '44, '45 or '46.

Q. It would at least be as early as 1946?

A. At least that, I would say.

Q. Would you say?

A. Yes, I would say so. [11]

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Was there only one type of jamb hardware that was manufactured by Towers?

A. As far as I know, that was all.

Q. Do you know what their trade name was, if any?

A. Towers.

Q. Did you buy the entire business of Towers?

A. I bought all their rights and patterns and literature, and so forth, in the going business.

Q. Did they have any patents that you bought?

A. They thought they had, and it turned out they didn't have.

Q. You didn't buy any patents from them, then?

A. I really wouldn't know.

Q. We were talking a little while ago about the first major change that was made in the jamb type hardware. I am not sure we got from you what you would consider the first major change.

A. The first major change, I would say, was the steel bracket.

Q. The bracket is the large piece that fits against the jamb; is that correct?

A. Yes.

Q. What was the bracket before you used the steel bracket?

A. Cast.

Q. Was there any difference in the steel [12] bracket, with reference to holes or slots, or anything of that kind? There was no change in the character of the——

A. As I remember, there was no other change made at that time.



Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What would you say, then, was the next succeeding major change?

A. In that particular set of hardware?

Q. Yes.

A. I rearranged the measurements on the particular set, I believe, and, if I remember correctly, we changed the bearings, improved the bearings.

Q. Whereabouts where the bearings located?

A. Connected the power arm to the bracket.

Q. By "power arm," that is the larger of the two arms?      A. Yes.

Q. And that is located above the other arm?

A. That's right.

Q. After the improvement which you just now mentioned, what, then, would you say was the next major improvement?

A. As I remember, after that came the later type hardware, with the two-piece cantilever arm and the decreased head room.

Q. When did that take place?

A. I believe about 1949, February—January, February, [13] maybe March.

Q. Did you design it yourself?

A. Yes, I developed it.

Q. When did you go into production on that first?      A. About the same time.

Q. And you said January, February or March of 1949? Was that what you said?

A. That's right.

Q. Do you have here your production drawings,

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

copies of your production drawings of that date?

A. We never had a production drawing.

Q. How did you make it, or how did the men in the shop make it?

A. The first set of hardware was made by me, and then the tooling was made from the parts. We first developed the parts, and the tooling was made from the parts.

Q. Do you have any drawings of that now?

Mr. Fulwider: We have got some drawings. They are little sketches which were made. We will let Mr. Fowler tell who they were made by.

The Witness: All of those machine parts, you see, had to be made on the outside. They were made by Carson—screw machine parts.

Q. (By Mr. Beehler): And the screw machine parts consist of what?

A. Bearings and bushings. [14]

Q. Who made the steel plates?

A. We did.

Q. From whom was the metal purchased?

A. Well, Rawlins, Jorgensen, Payne—take your pick—any steel jobber.

Q. How were the steel—I think you mentioned the brackets—brackets made? Was that a stamping?

A. It was a stamping, yes.

Q. And you had a die for the stamping?

A. Yes.

Q. Who made that die?

A. We made the die ourselves.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. How were the parts of the cantilever arms made?      A. Stamped.

Q. And they were made from a die?

A. Yes.

Q. And who made that die?

A. The Sturdee Steel Products.

Q. Do you have any records that show any drawings from which the die was made?

A. No. There wouldn't be any records at all. There may, at that time, have been sketches of a few certain parts of the die, but there was no complete drawing ever made.

Q. Which of the workmen in your shop made the dies for the split or divided cantilever arms?

Mr. Fulwider: By "divided cantilever arms," what do [15] you mean? We were talking about bracket plates a minute ago.

Mr. Beehler: I also talked about cantilever arms as being made in two parts.      A. Yes.

Q. (By Mr. Beehler): And that there were dies made to make two parts of the cantilever arm?

A. Yes.

Q. Which of the workmen made the dies to make the parts of the cantilever arms?

A. I am trying to think. We had several tool and die makers, and right at this time I don't remember which one of them did it.

Q. Can you give us their names?

A. They come and go.

Q. Will you give us the names of those who

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

were working for you at that time who may have had a part in the making of those drawings?

A. I could go back in my records and tell you who worked there at that time. But there was a man named White that did quite a bit of work, but I couldn't say if he was there in the first part of 1949 or not. However, I would say the tooling on that set wasn't finished until the middle or latter part of 1949, which means punch press work, punching holes.

Q. Who were the punch press operators?

A. I don't know who the punch press operators were. [16] We have had dozens of them there. They come and go all the time. If you want a list of my employees I would be happy to give it to you, but to pick any certain ones out, I couldn't do that. I don't know.

Q. Do you have the list here?

A. No, I don't have a list here.

Q. Will you, then, provide us with the names of the punch press operators who worked for you in January of 1949? Can you get that from your records?

Mr. Fulwider: That is all right.

The Witness: That is all right.

Q. (By Mr. Beehler): Could you have it for us this afternoon, or will it take you longer than that to dig it out?

A. How long will we be here? If it is like it

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

was yesterday, the answer would be no. It will not be much of a problem, no.

Mr. Fulwider: I would say that we could have the bookkeeper bring the information down.

Mr. Beehler: That would be very helpful.

The Witness: Yes, I would be glad to do that.

Mr. Beehler: All right.

Mr. Fulwider: Off the record.

(Short discussion off the record.)

Q. (By Mr. Beehler): How many did you have with you in 1949? How many total employees did you have in 1949, in [17] about January, approximately?

A. I would say three, maybe two, not including myself.

Q. Are any of them still with you?

A. No. I don't know about that, either. I could be wrong. Bill Patterson, who was with me at the start, was away for quite a while, and I don't know if he was with me at that time or not.

Q. At the time you give us the names of the employees in 1949, in about January, will you also give us the names of your employees who were with you in September of 1948, please?

A. Yes.

Q. And the last addresses that you have for them on your books also? A. Yes.

Following are the names and last addresses of employees that I had in September, 1948:

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Albert Foster,  
6335 North Figueroa,  
Los Angeles 42, Calif.

William Patterson,  
4432 Manhattan Beach Blvd.,  
Lawndale, Calif.

Herbert Barrett,  
4937 W. 140th St.,  
Lawndale, Calif.

Robert C. Joslyn,  
2075 E. 3rd,  
Long Beach, Calif.

Robert Jones,  
Oklahoma City, Oklahoma.

Horace Crawford,  
3741 W. 58th Pl.,  
Los Angeles, Calif.

John Owen,  
560 33rd St.,  
Manhattan Beach, Calif.

Fred E. Land,  
11151 S. Yukon,  
Inglewood, Calif. [18]

Following are the names and last addresses of employees that I had in approximately January, 1949:

Phoebe Fowler,  
352 W. 105th St.,  
Los Angeles 3, Calif.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Rex Moffat ,  
4069 Rosecrans Blvd.  
Hawthorne, Calif.

Spencer Ramsdale,  
12628 S. Broadway,  
Los Angeles, Calif.

Jim Fowler,  
2004 Faymont,  
Manhattan Beach, Calif.

Victor Comihula,  
334 E. 99th St.,  
Inglewood, Calif.

Irene Csaba,  
3905 W. 117th St.,  
Hawthorne, Calif.

James Hampton,  
4229 Rosecrans,  
Hawthorne, Calif.

Arthur Kessler,  
8704 El Manor Ave.,  
Los Angeles, Calif.

William Patterson,  
4432 Manhattan Beach Blvd.,  
Lawndale, Calif.

John Owen,  
560 33rd St.,  
Manhattan Beach, Calif.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Frances Church,  
123 N. Fir,  
Inglewood, Calif.

Anna Soch,  
6802 Brynhurst,  
Los Angeles, Calif.

Bruce Johnson,  
(moved back East).

Ralph King,  
2120 S. Oak St.,  
Los Angeles, Calif.

Winifred Wattenbarger,  
3412 W. 71st St.,  
Los Angeles, Calif.

Leon Gates,  
13707 Crenshaw Blvd.,  
Hawthorne, Calif.

John Jordan,  
248 E. 103rd,  
Los Angeles, Calif.

Albert Foster,  
6335 N. Figueroa,  
Los Angeles 42, Calif.

Herbert Barrett,  
4937 W. 140th St.,  
Lawndale, Calif.

Robert Jones,  
Oklahoma City, Oklahoma. [18-A]



Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): I am going to show you now, Mr. Fowler, what I understand to be a current catalog, one of your firm catalogs, captioned, "The Revolutionary Sturdee Econo-Jamb," and I ask you if that is one of your catalogs? A. Yes.

Q. What is the date of printing of that catalog, do you know?

A. I haven't the slightest idea.

Q. Who was the printer?

A. Cardinal Lithograph.

Q. Cardinal Lithograph? A. Yes.

Q. I also show you, Mr. Fowler, a price list of "Commercial Overhead Door Hardware," bearing the name "Sturdee Steel Products Co.," the address there given being 6820 Brynhurst Avenue, and it says on the second page, which is labeled Page No. 1, "Effective January 2, 1951." I will ask you, are those your price lists?

A. They certainly look like it.

Mr. Beehler: I offer in evidence, then, as Defendants' Exhibit No. 3, the catalog captioned, "The Revolutionary Sturdee Econo-Jamb," and, as Defendants' Exhibit 4 I offer in evidence the price list of "Commercial Overhead Door Hardware," accompanied by the Dealers Net Prices, and I will staple this Dealers Net Prices to the other, so that it will not be separated from the exhibit as we talk about it. [19]

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

(Said two documents were marked Defendants' Exhibit No. 3 and Defendants' Exhibit No. 4.)

Q. (By Mr. Beehler): Now, I find in the Dealers Net price list that the first three items are given specific trade names, namely, "Deluxe Jamb Type," "Econo Jamb Type," "Lo-Head Jamb Type," and "Pivot Set." Will you describe for us, Mr. Fowler, the Econo Jamb Type hardware, and you may have reference to the circular, Defendants' Exhibit 3, and refer also to Defendants' Exhibit 1, if you wish, to make the comparison.

A. Well, how could I do better than this picture?

Q. Is the "Econo Jamb Type" of the picture identical with the hardware of Defendants' Exhibit 1, shown there in the photograph?

A. This (indicating)?

Q. Yes. A. Oh, no.

Q. What is the difference?

A. This is a newer type, a newer type hardware.

Q. Structurally what is the difference?

A. It is all steel.

Q. Are there other differences than that?

A. Measurement, yes.

Q. There are still more differences, are there not?

A. Well, the measurements. That is about it, I guess. [20]

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. Then in the Econo Jamb Type of Exhibit 3 there is a divided cantilever arm, is there not?

A. That's right.

Q. And there is not a divided arm in the earlier one?

A. That's right.

Q. And what is the difference between the two, in the way they are attached to the garage doors?

A. Both bolted to the door.

Q. Well, maybe I can be helpful there. There are two pieces of angle iron in the photograph, are there not, and a single piece of angle iron in the Econo Jamb Type?

A. That's right. It is all assembled on the door there.

Q. How long have you been making the Econo Jamb Type?

A. I think the name "Econo"—I believe we used the name "Econo" in the latter part of 1948. If I remember correctly, we used the name "Econo" when we changed from the cast bracket to the steel plate.

Q. Do you have here the literature which you had available for the Econo Jamb Type when you first adopted that name?

A. There is no literature on that particular set.

Q. What is the first literature up to date? When did you first put out literature for the Econo Jamb hardware? [21]

A. As I remember, it was in February, February of 1949.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Who was the printer? A. Cardinal.

Q. May I ask you again what the date was when you first adopted the name "Econo Jamb"?

A. Oh, I couldn't remember just the date. It was some time the last part of 1948.

Q. What records of yours would show the date of adoption of that trade name?

A. Well, we have no literature. I frankly don't know just what would show it. Maybe sales tickets.

Q. Let me refer you now to another trade name used on the Dealers Net Price List, "Deluxe Jamb Type." Will you explain the difference between the "Deluxe Jamb Type" and the "Econo Jamb Type"?

A. It is a more rigid set of hardware, with practically the same measurements, but it is better built, with bronze bearings, etc., built for a heavier door.

Q. Does it have the same arrangement of parts?

A. Practically the same arrangement.

Q. Is the cantilever the same? A. Yes.

Q. Is the main arm the same?

A. As far as measurements were concerned, they are approximately the same. However, the "Deluxe" is channel [22] iron construction.

Q. Is the bracket the same?

A. No, the bracket isn't the same.

Q. What is the difference?

A. It is a two-piece bracket.

Q. Will you describe the two-piece bracket?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. It is a plate riveted onto angle iron.

Q. Aside from that difference, is it the same?

A. The measurements are about the same. But that is about it. It is a more substantial piece of hardware. Every part that can be bushed is bushed.

Q. With respect to the angle iron that fastens the hardware to the door jamb, is that the same on the "Deluxe" as on the "Econo"?

A. It is about the same.

Q. It is still a single long piece of angle iron; is that right?      A. Yes.

Q. Is there a gusset in the Deluxe jamb type used to attach the cantilever arm to the angle iron, as shown in the Econo jamb?      A. Yes.

Q. Do I use that term correctly—"gusset"?

A. We call it an extension on the door support.

Q. It is a little extra piece that sticks out on the angle iron?      A. Yes. [23]

Q. Now refer, please, to the third item on the Dealers Price List, indicated as "Lo-Head Jamb Type." Will you explain the differences that there are between the Econo Jamb Type and the Lo-Head Jamb Type for me?

A. The only difference is a rearrangement of the measurements.

Q. Rearrangement of which measurements, Mr. Fowler?

A. The measurements on the bracket and on the door support. The door support is the long angle that bolts to the door.

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. The weight and character of arrangement of the pieces are otherwise the same; is that it?

A. Practically the same.

Q. And the style of the cantilever arm is the same? A. Yes.

Q. The divided cantilever arm? A. Yes.

Q. Two pieces? A. Yes.

Q. And the Lo-Head uses the extension, does it?

A. Yes.

Q. When did you first start to use the trade name "Deluxe Jamb Type"?

A. Approximately the first part of 1949.

Q. And you did not use it before that?

A. I don't remember if I did or not. Maybe a few [24] months, one way or the other.

Q. When did you first start to use the term "Lo-Head Jamb Type"?

A. Oh, that must have been '46, maybe '45.

Q. You have always made the "Lo-Head Jamb Type" in the same way you now make it, have you not? A. No.

Q. What was the difference?

A. Well, there is a linkage in the cantilever arm, I believe, three linkages, that made it different. It is quite a complicated thing.

Q. You have shown me here a one-page circular, captioned "Installation Instructions for 'Lo-Head,'" and also the caption "Sturdee 'Easy to Lift' Overhead Door Hardware"?

A. Yes.

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: I offer this in evidence as Defendants' Exhibit No. 5.

May I correct my description of that circular. I described it as a one-page circular, but I should have said a four-page circular, with directions appearing on the two pages on the circular when the circular is opened up.

(Said circular was marked Defendants' Exhibit No. 5.)

Q. (By Mr. Beehler): Will you, Mr. Fowler, refer to this circular, please, Exhibit 5, and explain what the difference is between the Lo-Head Jamb Type hardware there [25] shown and the Econo Jamb Type hardware?

A. We eliminate the linkage.

Q. When you say "linkage," that refers to what arm or what part of the hardware?

A. What we term the "boomerang arm."

Q. And the boomerang arm, does that take the place of the cantilever arm in the Econo Jamb?

A. No.

Q. On the Lo-Head there is a main arm, isn't there?

A. Yes, there is a main arm on the Lo-Head.

Q. And I note, in addition to the main arm, there is a linkage, which consists of a relatively short arm attached to the plate, and a relatively long arm attached at one end to the short arm, and the other end to the door, and then a remaining

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

arm shorter than the other two, and it is connected, is it not, between the main arm and the relatively short arm?      A. That's right.

Q. And those three arms comprise what you describe as the linkage; is that right?

A. That's right.

Q. And, comparing that with the Econo Jamb, there is a single divided cantilever arm on the Econo Jamb, instead of the arm consisting of the three parts?      A. Yes.

Q. Which was just described in the "Lo-Head"? [26]      A. Yes.

Q. When did you change from the Lo-Head construction of Defendants' Exhibit 5 to the Lo-Head Jamb Type construction which you refer to in the Dealers Net Prices?      A. What is No. 5?

Mr. Fulwider: No. 5 is this one that you were just looking at.

Q. (By Mr. Beehler): What was the date of that circular, Defendants' Exhibit No. 5, if you know?      A. I haven't any idea.

Q. Who printed that?

A. If I remember correctly, the Miller Advertising Company. They made quite a bit of literature for me.

Q. When did you first start manufacturing the Lo-Head Jamb Type as it appears in the circular Exhibit 5?      A. Well, around 1945 or '46.

Q. Did you sell those items to the trade?

A. Yes.



Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. Were they sold around and about Los Angeles County?      A. Quite a few of them.

Q. Can you give us the name of one purchaser of that particular Lo-Head Jamb Type hardware within the County of Los Angeles?

A. The Modern Overhead Door Company, of Glendale.

Q. They have one of the Lo-Head—— [27]

A. They used that hardware, and they installed quite a bit of it.

Q. When did they first begin to purchase the Lo-Head type?

A. I wouldn't know that—probably '45 or '46—maybe '47.

Q. Do they still use that Lo-Head Jamb Type hardware?

A. No. That isn't manufactured any more.

Q. When did you cease to manufacture that style of Lo-Head Jamb Type hardware?

A. I believe the summer or very last part of 1949.

Q. You secured a patent, did you not, on that Lo-Head Jamb Type hardware, as illustrated in Defendants' Exhibit 5?

A. I secured a patent on that, I believe. Mr. Smythe would know.

Q. I show you a patent to R. Fowler, et al., No. 2,523,267, dated September 19, 1950, and I ask you, does the illustration on the patent drawing there correctly show the Lo-Head Jamb Type hard-

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

ware like we were talking about in connection with Exhibit 5?

A. There was never one made like that.

Q. What is the difference between that and the Lo-Head Jamb Type of Exhibit 5?

A. Well, to start with, the measurements are all different. [28]

Q. Anything else?

A. And we used a different type bracket.

Q. What was the difference in the bracket.

A. Just a different size, constructed differently.

Q. When you say "constructed," you mean a different material?

A. No. The original intention was to use that set of hardware for an eight-foot high door, as well as a seven-foot, which was not practical. That is the reason we never made the hardware like this. In other words, you will notice there is means for extending it out here, and also the cantilever arm. That was so we could use that on an eight-foot door, as well as a seven-foot door. But the set of hardware wasn't actually going on a seven-foot door. We did sell a lot of them, but they had to be used on a very light door.

Q. When you say there was a means for extending the cantilever arm, I take it you refer to the arm 15 on the patent drawing?

A. The arm 15.

Q. In any event, the arm 15 shows a cantilever arm which could be extended?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. That's right. That arm could be extended.

Q. And in the construction in the Lo-Head Jamb Type hardware, did you make some that had the cantilever arm extended? [29]

A. No.

Q. Did you ever make any that had a cantilever arm extended in that way?

A. No.

Q. Did you ever make any that had the main arm extendible, the way it is shown in the patent?

A. No.

Q. Where are the drawings that you submitted to the patent lawyer, which showed him how to make the illustration of the patent?

A. The patent lawyer took his own measurements and made his own drawing.

Q. What did he take the measurements of?

A. The hardware.

Q. Where was the hardware?

A. Installed on a door in the plant.

Q. Did you use the door as a means of access to your plant?

A. No. It was to be used only for development purposes, in the middle of the plant.

Q. Where was the door located?

A. I would say the back part of the shop.

Q. What were the premises on the opposite sides of the door?

A. It was just one big room, and it was right in the middle. [30]

Mr. Fulwider: I might say that Mr. Fowler has

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

a big frame in his plant, with a big door, that he uses for experimental purposes.

Q. (By Mr. Beehler): What was the size of that door?      A. That door was 7 by 16.

Q. Where is the hardware that was used on the door from which the measurements were taken for the patent application now?

A. That is a sixty-four dollar question. I haven't any idea.

Q. You don't know?      A. No.

Q. Where are the drawings you used when you first manufactured the Lo-Head hardware, as shown in Exhibit 5?

A. I think I told you earlier that we developed the hardware, and then we made dies and built hardware from the already developed parts.

Q. Do you have your sales records here?

A. Yes.

Q. Will you pick from your sales records the first sale of the Lo-Head garage door hardware?

A. I wouldn't even attempt to, because I haven't any idea. I will give you the records of '48 and '49.

Q. Well, you told us that this Lo-Head garage door hardware was manufactured in 1945. Now I want to see the [31] records which show where those items of hardware were sold in 1945.

Mr. Fulwider: He didn't bring any records prior to 1948. We could have, but I couldn't see

## Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

their relevancy, what relevancy they would have here.

Mr. Beehler: You have records?

Mr. Fulwider: It is conceded that this particular type hardware you are talking about was made more than a year before the patent was filed, and so we brought the records for the year 1948. I can't see that they are material later than that. We can show you 1945, '46 and '47, if you wish them.

The Witness: We did have a fire, and they may be there and they may not.

Mr. Beehler: Well, the relevancy is this, that the witness says that the hardware that is manufactured is not, in certain respects, like the hardware of the patent. The illustration shows some differences.

Mr. Fulwider: We concede that it was made like the illustration earlier than the earliest date you want to prove.

Mr. Beehler: Will you concede that it was made like the patent?

Mr. Fulwider: No. The testimony is to the contrary.

Mr. Beehler: That is what we would like to clarify.

Q. (By Mr. Beehler): Will you provide us, then, with [32] the names or with the identity of the sales of the first items of Lo-Head hardware which you sold in and about Los Angeles County, let us say, Lo-Head hardware of the general character illustrated in Exhibit 5?

A. If I remember correctly, Modern Overhead

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Door installed the hardware, but, frankly, I don't know the year they started that business.

Q. They were the first ones?

A. No, I wouldn't say they were the first ones, but they are the ones I happen to remember now, and they are close by.

Following are names and addresses of purchasers of "Lo-Head" hardware, in the years 1945 and 1946, in Southern California:

Belheimer & Walker,  
1037 E. Green St.,  
Pasadena, Calif.

J. B. Harvick,  
1957 W. 84th Pl.,  
Los Angeles, Calif.

E. R. Porter,  
Hermosa Beach, Calif.

San Jose Hardware,  
San Jose, Calif.

Calif. Hardware Co.,  
500 E. 1st,  
Los Angeles, Calif.

Burbank Lumber Co.,  
35 E. Olive St.,  
Burbank, Calif.

Acme Hardware Co.,  
150 S. LaBrea,  
Los Angeles, Calif.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Litchfield Lumber Co.,  
217 N. Glendale,  
Glendale, Calif.

Walt Nordstrom,  
435 E. Tamarack St.,  
Inglewood, Calif.

S. Mariani & Sons,  
3362 Mission St.,  
San Francisco, Calif.

Western Metal Supply Co.,  
7th & K St.,  
San Diego, Calif.

Imperial Hardware Co.,  
437 American Ave.,  
Long Beach, Calif. [33]

There were many other purchasers of this hardware having places of business other than in Southern California.

Q. How did you handle sales of your hardware at that time?      A. Installers and jobbers.

Q. Would you call Modern an installer?

A. Yes.

Q. Can you give us the name of a jobber you had at that time who handled the Lo-Head?

A. If I remember correctly, Baker Hamilton, at San Francisco.

Q. Did you have a jobber in Southern California?

A. Yes. Yes—Reserve Warehouse, at Oceanside.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. Did they purchase very much Lo-Head overhead hardware? A. Yes.

Q. Were there any other jobbers or installers of [33-a] that hardware in Southern California?

A. Yes, there were several of them. Lipton, at Long Beach.

Q. Were they wholesalers or installers?

A. Installers.

Q. Any others?

Mr. Fulwider: Why don't we do this: Have your bookkeeper call in and give the names of the customers in Southern California in 1945 and 1946, and if they want to go out and look at all the doors, that is fine.

The Witness: That is all right with me. I would rather do that than testify to something I am not sure about.

Mr. Beehler: That is fine.

Mr. Fulwider: Why don't we do it at the recess?

Mr. Beehler: Yes, and give us the addresses, too, at the same time.

Mr. Fulwider: Yes. May I ask a question now?

Mr. Beehler: Yes.

Mr. Fulwider: I am not sure in my own mind whether the doors sold generally had straight cantilever arms, cantilever arm segments, or whether they were curved a little bit, like what you call a boomerang arm.

The Witness. Originally, I think there were



Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

approximately 400 of those sold, with the cantilever original arm.

Q. (By Mr. Fulwider): And then you changed it to a curved arm? [34] A. That's right.

Q. (By Mr. Beehler): Which is the arm you are talking about, which was curved, or which wasn't curved?

A. This little arm right here, from here to here (illustrating).

Q. In other words, what I described, I think, as a relatively short part of the cantilever arm?

A. Yes, that's right.

Mr. Fulwider: As I remember it, you first used the straight arm, and then you put a curve in it to make it work better? A. Yes.

Mr. Fulwider: And you may find both straight ones and boomerang ones. Otherwise, they are the same, as I understand.

Q. (By Mr. Beehler): Do you recall when you first—did you first have it curved or straight?

A. First it was curved.

Q. And then changed to straight?

A. Yes.

Q. Do you recall when you made the change?

A. We only made a very few of them with the straight arm; I would say approximately 400; and that means that about 30 days after we made the hardware originally we changed it.

Q. I now show you, Mr. Fowler, one page, bearing the [35] name "Sturdee Steel Products.

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Hardware Manufacturers," in a yellow elliptical figure on the top, and indicated as "Jobber's Price List, Effective September 5th, 1948," and I ask you, is that one of your price lists?

A. Yes, it is.

Mr. Beehler: I offer it in evidence as Defendants' Exhibit 6.

(Said Jobber's Price List was marked Defendants' Exhibit No. 6.)

Q. (By Mr. Beehler): I take it that it is true that you were making the items appearing on this list on September 5, 1948; is that correct?

A. Yes.

Q. How long prior to September 5, 1948, were you making the items appearing on that list?

A. I wouldn't have any way of knowing. I don't know. Judging from this right here, we hadn't done anything to lower the headroom at that time, so that was probably the same as the original hardware that we made.

Mr. Beehler: May I have that answer read, please?

(The answer was read by the reporter.)

Q. (By Mr. Beehler): What change did you make in the hardware to lower the headroom?

A. Well, it is a rearrangement of the measurements.

Q. Would that be the only change necessary?

Defendant's Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. We put an extension on the door [36] supports.

Q. By "extension," you mean an extendible cantilever?

A. No. I mean the extension fastened to the door supports. I believe you referred to it as the "gussets."

Q. Aside from that change, there would be no other change made?

A. We changed the heads, changed the head trim.

Q. You changed the head trim?

A. That isn't entirely right. There has to be some means of adjustment on the top, to connect the cantilever arm to the door support.

Q. You had such adjustable means when the items on this price list were first sold, did you not?

A. No. You see, this arm here does not connect with the door support. Therefore, when this arm here is connected with the door that makes the adjustment. The cantilever arm is connected to the door and that makes the adjustment.

Q. In that door support you were talking about the angle iron, that fastens to the door?

A. Yes.

Q. On Exhibit 5?           A. Yes.

Q. When did you first change the construction from the angle iron in two pieces, like that shown on Exhibit 5, to an angle iron in a single [37] piece?

Defendant's Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. Well, somewhere in February or March, 1949, I believe.

Q. And you say you never used the angle iron in the single piece before January or February or March of 1949?      A. That's right.

Q. Do you recall whether or not you ever made a sale of your hardware to Lewis Patty, of 130 Mar Vista, in Pasadena?

A. 130 Mar Vista, Pasadena?

Q. Yes.

A. By golly, I don't remember that. What year?

Q. I don't know what year, but I have got a good idea.

A. Well, the reason I question that, we never sold to individuals. A very, very small amount of that was ever sold out of our place to individuals.

Q. Do you recall making jamb type hardware in your plant, where the plate that was fastened to the jamb had a slot in it, where the cantilever arm was attached to the plate?      A. No.

Q. Is it your statement that you never made a jamb type hardware of that character?

A. If I did, I don't remember it. No, I never made any hardware like that.

Q. Did you ever make, in your plant, any jamb type [38] hardware where the plate had more than one hole drilled for the attachment of the cantilever arm, that is, so that you could attach the cantilever arm in one of two or more holes?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. I never made that. I never made any hardware like that.

Q. When you say you never made it, do you mean that you never made it for sale, or that you never made it at all?

A. We may have experimented with something like that, but I never made it for sale.

Q. What was the purpose of having the cantilever arm extendible so that you can make it shorter or longer? What does that do to the door?

A. It changes the headroom.

Q. Is that all it does?

A. Changes the headroom—yes, that is all.

Q. Does it change the headroom by cutting a slot in the plate and moving the location of the end of the cantilever arm that fastens on the plate?

A. That changes the headroom very, very little. It isn't entirely practical.

Q. Does it change the headroom by putting two or three holes in the plate and changing the location of the end of the cantilever arm that fastens on the plate?      A. Yes.

Q. On this price list of Defendants' Exhibit 6, I find itemized Single Lo-Head Jamb Type and Double Lo-Head [39] Jamb Type. What was the difference between those two kinds of Lo-Head Jamb Type hardware?

A. The Double Jamb Type Lo-Head had heavier springs.

Q. Were there any other differences?

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. That's all.

Q. On the same price list I find itemized Single Jamb Type garage hardware. What kind of hardware was that?      A. Single Jamb Type?

Q. Single Jamb Type garage hardware for doors up to nine feet.

A. That was the same as the other, as the standard jamb hardware, with cast brackets, and so forth.

Q. And that is illustrated by which of the pieces of literature?

A. There is no illustration of that. However, that hardware looks like this (indicating).

Q. And you are now referring to Defendants' Exhibit 1?      A. Yes.

Q. Referring now again to Defendants' Exhibit 5, how would you change the head clearance, using that hardware overhead, I believe you call it, on a door?

A. That wouldn't change the headroom on that door.

Q. There is no adjustment on that to change the headroom; is that it?      A. That's right. [40]

Q. Using that kind of hardware, how would you line up the door, so that it would be perfectly straight up and down vertically when it is hung?

A. I don't believe I know what you mean.

Q. When you hang a door, if I may volunteer here, if you want the door to hang perfectly vertical—is that right?      A. Yes.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. What do you do to make it vertical when you use that hardware there?

A. You don't want it to be in or out at the bottom.

Q. That is what was earlier referred to as the "guide arm," I believe that is what you meant by that?

A. Yes. That is the only adjustment on that set of hardware. There is only one adjustment made on any set.

Q. And when you say that is where you fastened the cantilever arm, where you fastened it where?

A. There is only one end loose. There is only one end you can fasten.

Q. How do you do that with the "Econo Jamb" of Exhibit 3?

A. A two-piece cantilever arm is fastened after the hardware is installed, and that holds it in correct position.

Q. You mean, then, that the adjustment of the two pieces of the cantilever arm adjusts the door for vertical position? [41]

A. That's right.

Q. And adjusts the overhead clearance?

A. No. That has nothing to do with the overhead clearance. Possibly a half inch, but that isn't the purpose of it.

Q. Who printed this price list Exhibit 6, Mr. Fowler?

A. It would either be Miller or Cardinal. I believe it was Miller.

Defendants' Exhibit B—(Continued)  
 (Deposition of Roscoe Fowler.)

Q. Did you ever use any other printers for literature of this general nature since 1942, let us say?      A. Yes. We used Christensen.

Q. Was that the full name?

A. Christensen Printers I believe is the full name.

Q. Do you know where he is located?

A. If I remember correctly, it is on 54th, near Western.

Q. I don't remember, Mr. Fowler, whether you gave us the location of Miller or not?

A. Mr. Miller, I believe he is located in the United Artists' Building—Loew's State Building—I am sorry.

Q. And Cradinal?      A. I don't know.

Q. Is it in Los Angeles?      A. Yes.

Q. Was it "Cardinal Printers"? [42]

A. Cardinal Lithograph.

Mr. Fulwider: That is 2875 West Ninth Street, Los Angeles.

Q. (By Mr. Beehler): And those three were the only ones that you recall using as your printers since 1942?

A. Those are the only ones that I recall. However, Miller, you know, he is an advertising agent, and, naturally, he sends the printing out. He doesn't do it himself. But he handles the job.

Q. Miller is an advertising agent, and "Cardinal Lithograph" are printers?      A. Yes.

Q. And Christensens are printers?



Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Yes.

Q. Who else handles your advertising or printing?  
A. Carvel Morse.

Q. And his address?

A. I can give you his phone number.

Q. Yes. What is it? A. Arizona 29330.

Q. Arizona 29330? A. Yes.

Q. Has anyone else handled your advertising since 1942?  
A. No—and Miller.

Q. "W. H. Steele Co.," I find their name stamped on [43] this price list, Exhibit 6. Their address is given as 443 South San Pedro Street. Were they one of your jobbers, if you know?

A. They were representatives.

Q. They were representatives? A. Yes.

Q. What is the character of the business of a representative?

A. They make calls on the jobbers and dealers; they are manufacturers' representatives.

Q. How long have they represented you in that capacity?

A. I believe W. H. Steele represented us in 1945.

Q. Is W. H. Steele an individual?

A. No. It is owned by Allen M. Olds.

Q. Who do you do business with over there?

A. Allen Olds—well, Mr. McAloney.

Q. Can you spell "McAloney" for me?

A. No—McAloney and Olds.

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. They are still located on South San Pedro, 443?

A. I believe they are on Central now. I don't know the address.

Q. I asked you, I believe, before, whether you had tried, in making your door hardware, using a slot in the main plate, or, alternately, two or three holes, and you answered, I believe, that the slot was maybe not practical, [44] and you didn't talk too much about the holes. Tell me, by the use of—well, let's take them one at a time—by the use of a slot in the plate to change the location of the attachment of the lever arm at that end, can you change the vertical adjustment of the hang of the door? You can, can't you?

A. Golly, in order to answer that I have got to tell you more about it.

Q. Well, go ahead.

A. That slot in the bracket is used only when the cantilever arm is fastened to the door support.

Q. That is only used when the cantilever is fastened to the door support, with the angle iron on the door?

A. Yes. You do adjust it when the cantilever arm is fastened to the door support.

Q. Then if you had a slot you could adjust the vertical position of the door?

A. Only if the cantilever arm is fastened to the door support. It wouldn't mean anything otherwise.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Fulwider: That would be adjusted at either end, as I get it? A. Yes.

Q. (By Mr. Beehler): Then, by using holes you could change it, too, within the limits of the location of the holes? A. That's right. [45]

Q. You said earlier, I believe, Mr. Fowler, that when you sold the Fowler Jamb hardware you used the name "Sturdee," and I take it also you used these other names, "Econo Jamb" and "Deluxe Jamb" and "Lo-Head"; is that correct?

A. Yes.

Q. Do you also designate those items of hardware with any model numbers, any catalog numbers, to identify them?

A. Yes. They are on the price sheets.

Q. Do you have a current price sheet with you?

A. You have. I haven't.

Q. You refer, then, to this Exhibit 6?

A. No. You have another one.

Mr. Fulwider: That is correct. You had an earlier one, I think.

The Witness: Earlier.

Q. (By Mr. Beehler): Are there any model numbers on here? A. I believe so.

Q. Referring to Defendants' Exhibit 4?

A. Yes,—right there (indicating).

Mr. Beehler: The witness indicates the numbers beneath the names "Econo Jamb" and "Deluxe" on Exhibit 4. Do you use any other model numbers when you sell to specific customers?

## Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. No. [46]

Q. Do you ever use the model number "V1-8," in selling Vimcar?      A. No.

Q. You did sell jamb hardware, did you not, to Vimcar Sales?

A. Pardon me—Vimcar—oh, pardon me.

Q. Would you like to correct a statement?

A. Yes, I would. I used their own model numbers and identification on the hardware. I never used the "Sturdee" number, any of our identification model numbers, or anything connected with Sturdee.

Q. Did you ever sell to Vimcar any standard jamb hardware comparable to that pictured in Exhibit 1?

A. If I sold them eight- and nine-foot sets, I did. I don't remember if I sold them commercial hardware or not.

Q. Do you know what the designation "V1-8" means?

A. "V1-8," I think, means a single, with 8-inch headroom.

Q. Would that, then, be a standard jamb hardware item?      A. Yes.

Q. Extended?

A. I don't know what you are referring to—that went on any door?

Q. Well, V1-8 is what is their model number?

A. Yes. [47]

Q. For hardware supplied by you?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. Yes. That is equivalent to our Econo Jamb Single.

Q. And V2-8, what would that mean?

A. I believe that would mean the double.

Q. V1-3, what would that mean, if you know?

A. Unless it means the Lo-Head. That is probably what it is.

Q. Lo-Head?                   A. Yes.

Q. And that is the Lo-Head of what design?

A. I wouldn't know that at this time.

Mr. Fulwider: I think he is talking about the Vimcar marking at the time he was selling it.

A. That would be my Econo Lo-Head.

Q. (By Mr. Beehler): When you were engaged in supplying these jamb hardware items to Vimcar, did you supply them at the same time with drawings and specifications?

A. Drawings and specifications?

Q. Drawings or specifications?                   A. No.

Q. Did you supply them with photographs?

A. Yes.

Q. Did you supply them with printed literature?

A. Yes, I believe I did.

Q. Are you familiar with the "Tavart" jamb hardware? [48]

A. Yes, up to a point I know pretty well what it is like.

Q. Do you know whether or not they have an adjustment on it to adjust the door for overhead clearance?

## Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. For overhead clearance—no.

Q. Well, you don't know, or they don't have it?

A. No, they don't have it.

Q. Do you know if they have an adjustment on it to adjust the door for verticality in the jamb?

A. They do.

Q. Is that the same as yours?           A. No.

Q. What is the difference, if you know?

A. They have a slot in the bracket.

Q. When you bought the Tower Company, did you purchase it through an escrow?           A. No.

Q. Was the transaction handled in any bank?

A. No.

Q. Do you have any papers here in connection with that?

A. What has that got to do with the patent? I will answer, though. We do have the bill of sale for it.

Q. May we see it?

A. Well, I don't have it with me.

Mr. Fulwider: There is no reason why you can't see it, [49] if you want to. What date is the document?

The Witness: '42, I believe, or '43, somewhere along there.

Q. (By Mr. Beehler): Did you use any trade magazines for your advertising?

A. I believe we advertised in "Hardware Age" in 1948, '47 or '48.

Q. Any other magazines?

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

A. That is the only one I remember at this time.

Q. Did you run your ads every month, do you remember?

A. Frankly, I don't remember how that was. It might have been a year's contract, or it might have been by the month. I really don't remember.

Q. You said, Mr. Fowler, that as to the Tavart structure, the way they got the adjustment for verticularity in overhead was by means of a slot in the plate?

A. That's right. This drawing here is somewhat written over.

Q. Is this the relationship of the slots and the plate that you are talking about (handing drawing to the witness)?

Mr. Beehler: The witness referred to Sketch No. 1, in a rectangular area, on a circular entitled "Tavart, the Hardware for All Overhead Doors," on the last sheet of the literature, as showing a plate with a slot in it, to which the cantilever arm is attached; is that correct? [50]

A. That's right.

Q. And that is the means by which this particular hardware achieved an adjustment for verticularity?

A. That's right.

Mr. Beehler: I offer, then, in evidence, unless there is objection, this illustrated literature of "Tavart," as Defendants' Exhibit No. 7.

Mr. Fulwider: No objection.

(Said illustrated sheet was marked Defendants' Exhibit No. 7.)

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): Referring once again, Mr. Fowler, to the Econo Jamb, as illustrated in Exhibit 3, do you have here your first sales slip for that Econo Jamb item?

A. No. I am just trying to think how I could define the first set of that hardware.

Mr. Fulwider: He is asking about sales records. You have got 1948 and '49.

A. Yes, but I don't know how you would define that particular type of hardware in the sales records. It is here, if you can pick it out.

Q. (By Mr. Beehler): Can you pick it out?

A. No.

Q. How are your records set up to distinguish between items of hardware?

A. It refers to the name and the size. However, we did not change the number system and parts system we have now. [51]

Q. In 1948, let's say, what name did you sell the items under which correspond to the patent in suit?

A. "Econo Jamb."

Mr. Fulwider: I think the witness previously testified that the first sales of the jamb of the arrangement shown in this catalog here were in 1949.

Q. (By Mr. Beehler): Is that correct?

A. That is correct. You asked me when—what was your question, again?

Q. I have forgotten. What I am trying to get at is, what name you used in the books which will lead us to determine what your records show as to



Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

the first sale of a commercial item which corresponds to the patent in suit?

A. There just isn't a way.

Mr. Fulwider: I think "Econo" and "Deluxe." You never called the hardware you made according to the patent anything else, did you?

A. That's right. But we called a previous set "Econo."

Q. (By Mr. Beehler): May we see your books?

A. Yes. That is what I brought them down here for.

Q. Without following all through them, can you point out here where, in these records, they start telling about the Econo Jamb?

A. Well, sir—

Mr. Fulwider: I think "Econo" turns up first in the [52] January sales for 1949.

Mr. Beehler: In the January sales for 1949?

Mr. Fulwider: Yes.

Q. (By Mr. Beehler): Under purchasers of the Lo-Head, I find Billheimer & Walker. Do you recall them?

A. No, I don't. Billheimer & Walker, you say?

Q. Billheimer & Walker. A. No.

Q. Will you, Mr. Fowler, go back with your counsel on the sales records, perhaps over the lunch hour, and get us the names of the purchasers of the Lo-Head in about 1946, or as early as you can?

A. Sure.

Q. With respect to Lo-Head type door jambs,

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

did you make all those parts yourself, or did you have some of them made for you by other people?

A. Maybe screw machine parts. Screw machine parts were made outside. Everything else was made by us.

Q. Do you have any license to manufacture elsewhere than in California? A. No.

Q. At one time, because of your manufacturing of the jamb type hardware, you made the plates by the use of a casting attached to an angle iron; is that correct?

A. A casting attached to an angle iron?

Q. Yes. [53]

A. You mean the jamb bracket?

Q. The jamb bracket. A. No.

Q. You did not?

A. No. If I understand you correctly, a casting bolted to an angle iron, the two parts together make a jamb bracket?

Q. Yes. A. No.

Q. To complete the record, I show you, Mr. Fowler, a circular bearing the caption, "Sturdee Jamb Hardware for Overhead Garage Doors," a four-page circular, where, on the jamb plate, it is indicated as "Deluxe Jamb." That is a sheet of your literature, is it not? A. Yes, that is.

Mr. Beehler: I offer that in evidence as Defendants' Exhibit 8.

(Said circular was marked Defendants' Exhibit No. 8.)

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Q. (By Mr. Beehler): Will you examine the back of this circular, Exhibit 8, where you have a picture of the Lo-Head jamb, and tell us what the difference is between the parts of the Lo-Head jamb and the Econo jamb?

A. This is the original Lo-Head that we made, with the boomerang arm and linkage.

Q. Is that comparable, then, to Exhibit 5?

A. That's right. [54]

Q. Does that have the three parts to the control that is presently controlled by the double cantilever arm?

A. Yes.

Q. It is correct, then, that the present Lo-Head Jamb is different than this; is that right?

A. Yes.

Q. How does the Lo-Head differ from the illustration on the back of Exhibit 8?

A. It looks the same as the Econo. The only difference is the measurement.

Q. You have just given the name "Lo-Head" to a construction similar to the Econo Jamb, but differing in some measurement, is that right?

A. That's right.

Q. On this Lo-Head Jamb, the picture on the back of Exhibit 8, it looks to me as though there was a slot in the middle of the plate adjacent the point at which the main arm is attached. Is that true, or is that just something that is on the bulletin?

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. There is none there, but there is no reason for it. I believe this boomerang comes up here and fastens to the top of the cast iron bracket, and this goes down here, and there is a short linkage goes from here over to the boomerang, and that is all you see there. (illustrating).

Q. And that little white thing is a part of the short linkage? [55]

A. Yes, that's right. You can probably check that on another piece of literature. Here it is right here (indicating). Do you see it?

Q. I recall that, yes.           A. Yes.

Mr. Beehler: I have no further questions. We might adjourn, and we can meet again this afternoon for the information he is going to try to get by that time.

Mr. Fulwider: You can probably get that during the lunch hour.

The Witness: I doubt it. We had a fire just a year ago, and we never have really got the records back in shape. But we will be glad to do that.

Mr. Fulwider: Do you have your Department of Employment record of contributions? That will give you the names of the employees at that time.

The Witness: I probably have that. My auditor will know.

Mr. Fulwider: We will do the best we can. We can adjourn to about 1:30. It is 12:30 now. And we will see what we can get, and what we can't get now we can supply you later and let it go in as being testified to by him under oath.

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

Mr. Beehler: That is satisfactory.

Mr. Fulwider: And then he wouldn't have to be here. He can supply it to you by letter, and the letter would be [56] the best on that.

The Witness: I can do whatever you want.

Mr. Fulwider: He can write you a letter, and we can stipulate that that will be all right.

Mr. Goodman: Or perhaps have the deposition written up and leave blank spaces for the witness to insert the information requested, and let it go in the deposition, and let us have the understanding now as to what that is, for the purpose of this record.

Mr. Fulwider: All right. That's a good idea.

Mr. Beehler: Do you want to make a statement now?

Mr. Goodman: We want the names and addresses of all employees of the plaintiff as of December, 1948, and, second, the names and addresses of all employees in January of 1949, and, third, the names of purchasers of Lo-Head as early as the Lo-Head was sold.

Mr. Fulwider: All right.

Mr. Beehler: I will ask just one more question.

Q. (By Mr. Beehler): Do you have any plans or specifications or sketches, other than those you showed us here, of the jamb hardware as illustrated in the patent?

A. Any plans or specifications?

Q. Drawings or specifications.

Defendants' Exhibit B—(Continued)  
(Deposition of Roscoe Fowler.)

A. No; no, I haven't.

Q. At all?

A. None at all. You have got the works. [57]

Mr. Beehler: Let's stipulate, if you are willing, Mr. Fulwider, that the deposition may be signed before any Notary Public.

Mr. Fulwider: Yes. I will so stipulate.

/s/ ROSCOE FOWLER.

Subscribed and sworn to before me this 8th day of October, 1951.

[Seal] /s/ EUNICE B. HANSON,  
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 19, 1955. [58]

State of California,  
County of Los Angeles—ss.

I, C. W. McClain, do hereby certify that I am a Notary Public in and for the County of Los Angeles, State of California, and that the witness in the foregoing deposition named, Roscoe Fowler, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause; that said deposition was taken pursuant to Notice, commencing at 10 o'clock a.m., on Thursday, August 30, 1951, at the office of Messrs. Huebner, Beehler, Worrel & Herzig, 410 Story Building, 610 South Broadway, Los Angeles 14,

Defendants' Exhibit B—(Continued)

(Deposition of Roscoe Fowler.)

California, and was completed on the same day; that said deposition was written down in shorthand writing by me and was thereafter transcribed into typewriting under my immediate supervision, and that the foregoing 58 pages contain a true and correct transcription of my shorthand notes so taken.

I further certify that during the taking of the foregoing deposition there were eight exhibits marked on behalf of the defendants, which are hereto annexed.

I further certify that it was stipulated by and between counsel that the deposition may be signed before any Notary Public.

I further certify that I have incorporated in the foregoing deposition certain information furnished to me in a letter sent to me at the request of counsel, which letter [59] is hereto annexed.

I further certify that I am not connected by blood or marriage with either of the parties, nor interested, directly or indirectly, in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office this 6th day of September, 1951.

[Seal]     /s/ C. W. McCLAIN,  
Notary Public in and for the County of Los Angeles, State of California.

Received in evidence November 8, 1951. [60]

[Title of District Court and Cause]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 51, inclusive, contain the original Complaint; Answer; Subpoena to Roscoe Fowler; Notice and Supplemental Notice Under R. S. 4920; Minutes of the Court for March 19, 1952; Findings of Fact and Conclusions of Law; Notice of Appeal; Bond on Appeal; Designations of Record on Appeal and Order Extending Time to File Record and Docket Appeal which, together with Original Reporter's Transcript of Proceedings on November 8, 9, 13 and 14, 1951 (in two volumes) and original Plaintiff's Exhibits 1 to 25, inclusive, and Defendants' Exhibits A to Z-1, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 13 day of August, A.D. 1952.

[Seal]                      EDMUND L. SMITH,  
Clerk,

By /s/ THEODORE HOCKE,  
Chief Deputy.



[Endorsed]: No. 13490. United States Court of Appeals for the Ninth Circuit. Roscoe Fowler, Appellant, vs. Vimcar Sales Company, a Corporation, Victor M. Carter and Morris J. Halopoff, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 15, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals

For the Ninth Circuit

Appeal No. 13490

ROSCOE FOWLER,

Appellant,

vs.

VIMCAR SALES COMPANY, VICTOR M.

CARTER and MORRIS J. HALOPOFF,

Appellees.

STATEMENT OF POINTS ON APPEAL

The points upon which Plaintiff-Appellant will rely on appeal are as follows:

1. The Court erred in holding the patent in suit, No. 2,516, 196, to be invalid.

2. The Court erred in holding that U. S. Patent No. 2,523,207 was a prior invention of the subject matter of the patent in suit.

3. The Court erred in holding that defendants had not competed unfairly with plaintiff.

4. The Court erred in not holding that the defendants conspired among themselves to compete unfairly with plaintiff.

5. The Court erred in dismissing the complaint and in not awarding judgment to plaintiff against each of the defendants for wilful and deliberate patent infringement and unfair competition.

FULWIDER, MATTINGLY &  
BABCOCK, and

ROBERT W. FULWIDER,

By /s/ ROBERT W. FULWIDER,  
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1952.

No. 13490.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROSCOE FOWLER,

*Appellant,*

*vs.*

VIMCAR SALES COMPANY, VICTOR M. CARTER and  
MORRIS J. HALOPOFF,

*Appellees.*

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## APPELLANT'S BRIEF.

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MAY 14 1953  
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LEWIS



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No. 13490.

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## APPELLANT'S BRIEF.

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### Jurisdictional Statement.

This appeal is from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing plaintiff-appellant's complaint for patent infringement and unfair competition. The District Court had jurisdiction of the patent infringement count under 28 U. S. C. 1338 (a), and of the unfair competition count under 28 U. S. C. 1338 (b) and also 15 U. S. C. 1121 and 1126 (h) (i). The judgment being final, this Court has jurisdiction under 28 U. S. C. 1291.

The complaint appears at pages 3-8 of the record, and the answer at pages 8-15.

For clarity, the plaintiff-appellant will herein be referred to by name or as plaintiff, and the defendants-appellants by their individual names or as defendants.

### Statement of the Case.

The patent in suit is No. 2,516,196 issued to the plaintiff Roscoe Fowler on July 25, 1950 on an application filed by him on November 14, 1949. The patent is entitled Adjustable Overhead Door Hinge and is Exhibit 1 in the book of Exhibits. [R. 353].

The invention of the patent in suit is primarily useful in hanging overhead garage doors, and while the patent is entitled a "hinge," it in fact discloses and claims an entire apparatus for supporting the door from the door jamb so that the door can be swung up from its vertical closed position to a horizontal position inside the garage, leaving the doorway open. Apparatus for mounting doors for movement to an overhead position is generally spoken of in the trade as overhead door hardware. Most commercial overhead hardware falls into one of three categories, referred to in the trade respectively as track, pivot and jamb. [R. 186.]

In track type hardware, the upper edge of the door rides in a track to guide it to overhead position. In pivot type hardware, the door is supported on the side walls of the garage, or on special mounts. In jamb type hardware, the door is mounted directly on the door jambs. These various types of overhead door hardware are recognized in the trade as being of different character or class. [R. 221, 279.]

The door mounting apparatus or hardware of plaintiff's patent in suit is of the jamb type, the details of which will be discussed shortly.

The plaintiff Roscoe Fowler is in the business of manufacturing and selling overhead door hardware under the firm name of Sturdee Steel Products Co., and his hard-

ware is generally known in the trade as Sturdee. The business when purchased by Fowler in 1942, was known as the Sturdee Overhead Door Co. [R. 294], and was manufacturing both pivot and jamb types of hardware.

All of the early jamb hardware suffered from the disadvantage of not being adjustable without re-hanging the door or at least partially dis-assembling the hardware and refastening it to the door. Many and varied solutions have been proposed by numerous workers in the art including the several witnesses who testified in this case. All were seeking a jamb-type hardware which was easy to mount and which could be adjusted after mounting, without detaching it from the door, and which when once adjusted would stay in adjustment.

The plaintiff made various changes in his jamb hardware from time to time and early in 1949 invented and started manufacturing the jamb hardware disclosed and claimed in the patent in suit under the name of Econo-Jamb. Plaintiff is still manufacturing and selling said hardware to the trade as Sturdee Econo-Jamb Hardware.

#### **The Disclosure of the Patent in Suit.**

As seen best in Figs. 1 and 2 of the patent drawing [R. 353], the jamb hardware of plaintiff's invention is quite simple. It provides jamb brackets 11 which are bolted to opposite sides of the door jamb 2. Pivotally mounted on each jamb bracket 11 at 11a is a heavy power or master arm 12 which carries the weight of door 1 by having its lower end attached to a side rail 13 on the door. As the master arm 12 is rotated about its pivot 11a, it moves the door from closed to open position. The other end of the master arm 12 has a kicker plate 18 pivotally attached thereto. A strong spring 17 connects the kicker plate to

the lower portion of the door jamb to counter-balance the weight of the door during raising.

The door 1 is positioned in its closed position and guided in its movement by a guide arm or link 14 which is known in the trade as a "cantilever arm." The positioning link 14 is made extendible by forming it of two overlapping link members 14a and 14b, one of which has a pair of slots 14c, the other has correspondingly positioned holes to carry bolts 15 which extend through the slots. The bolts 15 and their corresponding nuts hold the link members tightly together to form a composite reinforced link or cantilever arm. One end of the arm 14 is pivoted on a pin fixedly mounted on the jamb bracket 11, and the other end of the link 14 is pivoted to a bracket 16 fastened to the lower end of the door side rail 13.

From Fig. 1, it is seen that the vertical position of the door when in closed position will be determined by the length of the link or cantilever arm 14. By loosening the bolts 15, the length of link 14 can be readily changed, and then permanently fixed in its new position by cinching up said bolts. This adjustment can be made at any time after the door has been mounted on the jamb.

The construction of link members 14a and b and slots c is very clearly shown in the photos of plaintiff's hardware Exhibits 7, 8 and 9. [R. 361, 363 and 365.]

The foregoing construction is summarized in Finding IX [R. 24, 25] which uses the terminology of the trade, referring to the link 14 as a cantilever arm, and the door bracket 16 as a "gusset plate." With reference to the link 14 or cantilever arm, Finding IX states:

"the cantilever arm being extendible for adjustment,"

### The Claims in Suit.

Finding X [R. 25] points out that all of the claims of the patent in suit are limited to an adjustable cantilever arm as follows:

X. "Each of the three claims of Letters Pat. No. 2,516,196 includes as an element a cantilever arm which is adjustable for the purpose of adjusting the door to a vertical position, the means of adjustment being set forth in different phraseology in the three claims but covering essentially the same principle of alleged novelty."

Claim 1 is typical of the three claims of the patent and is set forth in outline form at R. 357. It reads as follows:

1. "A mechanism of the type described for pivotally supporting an overhead door on a door frame, comprising:

(a) a bracket (11) for mounting to the door frame;

(b) a master arm (12) pivotally mounted intermediate the ends thereof to said bracket;

(c) means for pivotally connecting one end of said arm (12) to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame;

(d) a link (14) of adjustable length;

(e) a pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket;

(f) means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal con-

nection between said arm and door, said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions;

(g) means (slots 14c and pins 15) for adjusting the length of said link while the aforesaid intermediate portion of the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame;

(h) and means including a tension spring (17) for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.”

Elements (e), (f), (g) of Claim 1 deal specifically with the extendible link or cantilever arm 14 and recite that its pivotal connection with jamb bracket 11 is fixed and immovable.

#### **The Parties Defendant.**

The defendant, Vimcar Sales Company, is a corporation wholly owned, operated and controlled by the defendant Carter [Finding III, R. 23] and operates as a distributor or jobber, buying various hardware products from many manufacturers and reselling them to the trade.

In 1947, and perhaps earlier, Vimcar started selling a jamb-type hardware manufactured by Tavart Co., but in 1949 Vimcar ceased handling said hardware [R. 89] and started purchasing from plaintiff its Econo-Jamb hardware which embodied the invention of the patent in suit. The first purchase of said hardware was July 12, 1949. [R. 88.]



Soon thereafter, in the latter part of 1949 or in January, 1950 [R. 72, 73] Mr. Donner of Vimcar contacted the defendant Halopoff about manufacturing jamb hardware for Vimcar. Donner arranged for Mr. Korse of Vimcar to give to Halopoff a set of plaintiff's hardware [R. 74], which Halopoff took to his shop [R. 75] and noted that it was the same as Sturdee hardware sold by plaintiff [R. 78]. Halopoff then made up a set of the hardware here in suit and showed it to defendant Carter. [R. 79.] The first order was issued to Halopoff by Vimcar on February 7, 1950 to make said hardware for Vimcar. The defendants admitted at the trial [R. 43] that there "isn't any essential difference" between plaintiff's hardware, physical Exhibit 2, and defendants' hardware, physical Exhibit 5, and see paper exhibits 6, 7, 8, 9 [R. 360-366] showing both plaintiff's and defendants' hardware.

By reference to the exhibits [R. 360-366] it is seen that defendants' hardware has the same parts as plaintiff's hardware, namely, a jamb bracket 11, master arm 12, side rail 13, door bracket 16 fast to said side rail, and extendible link (cantilever arm) 14 formed of an upper link 14a provided with slots 14c, and a lower link 14b provided with holes to carry the bolts 15, that the parts are substantially the same size and shape, and that they operate in the same manner as plaintiff's hardware.

Plaintiff in 1949 supplied Vimcar with copies of plaintiff's instruction sheets [R. 367] and a series of photos of the hardware [Exh. 22, A, B, C; R. 389, 390, 391] for Vimcar to use as selling aids. [R. 61.]

The first delivery of the infringing hardware was made by Halopoff to Vimcar on February 15, 1950. [R. 80.] On April 5, 1950, the purchasing agent of Vimcar wrote

to plaintiff [R. 38] asking for half-tone engravings illustrating plaintiff's hardware, stating they were needed for Vimcar's new catalog. Vimcar's last purchase from plaintiff was about April 28, 1950.

After Vimcar stopped buying from plaintiff, Vimcar continued to use the same instruction sheets, making slight modifications thereof [R. 368-373] and using brochures which contained cuts made from the photos previously supplied by plaintiff. [R. 377-378.] The three pictures marked A, B, C on Vimcar brochure [R. 378] are respectively copies of plaintiff's photo Exhibits 22, A, B, C [R. 389, 390, 391]. See also Exhibit 18 [R. 385] which has a cut corresponding to [R. 378A]. The identity between the plaintiff's photos and instruction sheets, and Vimcar's brochure and instruction sheets is covered by Moore's testimony. [R. 54-61.]

Defendants were notified on March 10, 1950 by letters [R. 379, 380] of the pendency of plaintiff's patent application and that the Halopoff hardware, being substantially identical with that of plaintiff, would infringe the patent which plaintiff expected to issue soon on said application.

Defendants did not discontinue making and selling the infringing hardware and on August 7, 1950, their attorneys were notified by letter [R. 382] of the issuance of plaintiff's patent and offering defendants a license thereunder. Defendants did not take a license and this suit was brought on April 5, 1951 to restrain further infringement.

In their answer defendants denied infringement and validity but at the trial did not contest infringement, relying solely on their claim of invalidity of plaintiff's

patent. This defense was upheld by the Court. However, the Court found [Finding XIX, R. 29] that the patent if valid was infringed by defendants. See also Conclusion No. 6 [R. 32], to the same effect.

### **The Prior Art.**

Defendants introduced 17 patents in evidence to show the prior art, Exhibits O, T and U-1-15 [R. 425, 484-553a], of which seven were discussed by their expert witness Coulter, Exhibit T, and six of the patents forming Exhibit U. None of the patents discussed by Coulter shows jamb-type hardware except Exhibit T, which was filed before but issued after the patent in suit. No interference between Exhibit T and the patent in suit was declared by the Patent Office.

Exhibit O is a patent issued to plaintiff on a joint application by plaintiff and one of his employees by the name of Murphy. It covers an earlier development of plaintiff using a jackknife-type cantilever arm and positions the door in the doorway not by adjusting the length of the cantilever arm but by varying its point of attachment to the door. It shows a pin and slot arrangement on one of the jackknife elements to allow use of the hardware on either 7' or 8' doors. This patent is owned by plaintiff.

Defendants produced several competitors of plaintiff who testified as to their various attempts to design practical means to secure adjustability of their hardware. None of these witnesses had made or sold hardware having an extendible cantilever arm. Each of said witnesses had sought to obtain adjustability by providing slots in the jamb bracket or foot bracket for shifting the cantilever pivot pin from one position to another, as for example in the Tavart hardware. The testimony of

Varley, manager of Tavart [R. 269], and four experienced door hangers called as witnesses by plaintiff, was to the effect that the Tavart shiftable pivot pin gets out of adjustment in use, and necessitates re-setting the door from time to time. [R. 276, 278, 279, 281, 284.]

On the basis of the said art, the Trial Court found plaintiff's patent invalid on the grounds of "prior invention, prior public use and for want of invention." The findings are likewise in general terms and do not refer to any particular prior patent or use. See Findings XII, XIV, XV, XVII, XVIII. [R. 27-29.] Finding XIV states that it was old to adjust jamb hardware by adjusting "at the jamb plate," and "at the end of the cantilever arm where it joins the door."

There is no finding by the Court that it was old to provide an extendible cantilever arm or link formed of two overlapping segments which have complemental bolts and slots to allow adjustability of the length of the link to thereby position the door, as shown and claimed in plaintiff's patent, and as made and sold by both plaintiff and defendants.

#### **Count II for Unfair Competition.**

This count of plaintiff's complaint was based on the facts heretofore recited, showing identity of plaintiff's and defendants' structures, employment by Vimcar while it was a jobber of plaintiff's of Halopoff to duplicate plaintiff's hardware, use by Vimcar of cuts made from photos furnished by plaintiff while Vimcar was one of plaintiff's

jobbers, and failure by Vimcar to notify the trade that hardware sold by it which was identical with plaintiff's except that it was inferior in quality, was not made by plaintiff. The Trial Court ruled that these acts did not constitute actionable unfair competition.

### Questions Presented.

1. Whether defendants who admittedly infringe plaintiff's patent and have copied into their door hardware every essential element of plaintiff's hardware including the extendible cantilever arm and fixed pivots provided by plaintiff for adjusting the vertical position of the door, can escape liability for said infringement by asserting that the claims of plaintiff's patent, which specifically recite plaintiff's entire combination of elements including said extendible cantilever arm and fixed pivots, can nevertheless be rendered invalid by prior devices which do not show the claimed combination, and specifically do not have extendible cantilever arms or fixed pivots, but on the contrary employ other and different means to adjust their doors.

2. Whether it is unfair competition for defendants to copy both the functional and non-functional features of plaintiff's hardware in every essential detail while acting as distributor of plaintiff's products, and to then sell said copies of plaintiff's products in competition with plaintiff, using instruction sheets and brochure cuts copied from plaintiff's instruction sheets and cuts, thereby confusing the public as to the source of said products and enabling defendants to pass off their said copies as products of plaintiff.

### Specification of Errors.

1. The Court erred in holding plaintiff's patent invalid on the grounds of prior invention, prior public use and want of invention, and in its Findings XIV, XV, XVII and XVIII in support thereof, since all of the claims in suit recite in detail plaintiff's complete structural combination which is not shown in any of the prior art patents or uses, and no expansion of said claims that might cause them to read on the prior art was necessary or contended for by plaintiff, since infringement of the strict literal wording of said claims was admitted by defendants.

2. The Court erred in Conclusion of Law No. 2 in holding that the co-pending earlier filed but later issued joint patent to plaintiff and his employee Murphy disclosed the inventive combination of the patent in suit, and that said patent was prior art as to the patent in suit.

3. The Court erred in holding, and in Findings XX, XXIV, XXVI, that defendants did not compete unfairly with plaintiff by slavishly copying plaintiff's hardware, and passing off and aiding others to pass off defendants' hardware as that of plaintiff's, and holding that said hardware made by plaintiff and defendants has no non-functional features, when it is obvious that hardware embodying plaintiff's invention can readily be made with an appearance which is not confusingly similar to the hardware made and sold by plaintiff and formerly purchased by defendants from plaintiff and re-sold to the trade.

## SUMMARY OF ARGUMENT.

### I.

**The Infringement of Defendants Was Willful Since They Deliberately and Knowingly Copied Plaintiff's Hardware in All Essential Particulars Including Each and Every Element of the Complete Combination Set Forth in Detail in the Claims in Suit.**

The complete appropriation by defendants of plaintiff's hardware in its entirety is clearly shown by Exhibits 7, 8 and 9. [R. 361-366.] The defendant Vimcar was a distributor of plaintiff when the copying was done. The defendant Halopoff had a set of plaintiff's hardware before him when he allegedly designed the infringing hardware.

Even though all of the claims of plaintiff's patent in suit are very limited, reciting in detail each and every element of plaintiff's structure, they are nevertheless admittedly infringed by defendants, and the Court so held. Since the copying was willful and deliberate, plaintiff is entitled to exemplary damages.

### II.

**The Plaintiff's Invention Defined by the Claims in Suit Is a New and Meritorious Combination of Elements, Which Combination Provides Adjustment of the Door in a Different and Better Way, and Exhibits More Than the Ordinary Skill of Workers in the Art. This Is Patentable Invention Under the Law.**

A new combination of old elements is patentable. Plaintiff here has a new combination of old elements, for which he obtained a patent.

Plaintiff does not claim a patent on any *one* of the numerous elements in his claims, but only to the whole combination in its entirety.

**A. Plaintiff's Combination Is New and Meritorious and Amply Meets All of the Tests of the Foregoing Cases.**

The combination set forth in plaintiff's claims, including the extendible cantilever arm and its fixed pivots is novel. It is also meritorious, as testified to by the general manager of plaintiff's chief competitor, and by four experienced door hangers.

Plaintiff's hardware is simple to adjust and does not come out of adjustment with rough usage. The best evidence of the excellence of plaintiff's hardware is the defendants' deliberate and slavish copying thereof when other types were available to them.

**B. Plaintiff's Invention Is the Result of Patentable Ingenuity Clearly Rising to the Dignity of Invention in This Crowded Art.**

Plaintiff's new hardware is a real advance in the art. Its simplicity does not detract from its excellence. The cases hold that simplicity alone is not fatal to an invention.

That plaintiff's invention was not obvious is shown by the long failure of others to evolve it.

One of plaintiff's competitors, called as a witness by defendants, testified that "It (plaintiff's hardware) is the best there is, no doubt in my mind about it." [R. 148.]



III.

**None of the Prior Art Evidence Anticipates the Claims in Suit, Which Are Specific to Plaintiff's Jamb Hardware as Shown and Described in His Patent, nor Does Said Evidence Negative Invention in Plaintiff's Jamb Hardware, for There Is no Teaching in Any of Said Art of Plaintiff's Means for Securing His Superior Results.**

Neither the Trial Court's Minute Order, the Findings or the Conclusions give any hint as to what prior art the Court relied on in holding plaintiff's patent invalid.

The claims of a patent measure the invention, and since none of plaintiff's detailed claims is met by the prior art, it was error to hold them invalid. They are combination claims, and on the authority of *Faulkner v. Gibbs* (C. A. 9), 170 F. 2d 34, affirmed by Supreme Court, and other cases in this Circuit, they are valid.

**A. The Prior Art Patents Do Not Invalidate Plaintiff's Patent.**

Most of the prior art patents put in evidence relate to *pivot* hardware, as contrasted to *jamb* hardware, and therefore have no relevancy here. Numerous witnesses, including defendants' expert, testified that these two types are different. Their problems are dissimilar. Their structures are dissimilar.

Every patent carries a presumption of validity and the burden is on the one attacking that validity. None of the numerous patents put in evidence as Exhibit U, are any closer than those cited by the Patent Office. Hence, defendants have not sustained their burden.

**B. The Validity of Plaintiff's Patent Has Not Been Affected by the Prior Uses Introduced in Evidence by Defendants.**

Only the Tavart hardware is at all relevant to the case, and it solves the problem in an entirely different way. Tavart uses a cantilever arm of fixed length and shiftable pivots. Plaintiff on the other hand uses an extendible cantilever arm and fixed pivots. Plaintiff's structure is different from and better than Tavart's. Tavart's hardware gets out of adjustment, plaintiff's does not.

**IV.**

**The Hardware Shown in the Earlier Filed But Later Issued Fowler-Murphy Patent Does Not Anticipate or Teach the Invention of the Fowler Patent Here in Suit Since It Has no Means to Adjust the Vertical Position of the Door Without Disconnecting the Cantilever Arm from the Door and Repositioning It. Furthermore, Since Said Joint Patent Was Co-pending, It Is Not Prior Art.**

The Fowler-Murphy patent on its face does not anticipate or teach the present invention. It has a loose cantilever arm like early types of jamb hardware, that is separately attached to the door. Therefore, the problem solved by the patent in suit is not even present in the joint patent.

Since the Fowler-Murphy patent was co-pending with and issued after the patent in suit, it was not prior art. The rule of *Milbourne v. Davis* has no application here.

V.

The Copying of Plaintiff's Hardware by Defendants Who Were Then Dealers Selling Plaintiff's Hardware, and the Substitution of Said Copies in Defendants' Line of Products in Lieu of Plaintiff's Hardware, Without Notice to the Trade of Such Substitution, Constituted Unfair Competition with Plaintiff Because It Resulted in Confusion of the Public and Passing Off of Defendant's Hardware As That of Plaintiff, the Form and Appearance of Plaintiff's Hardware Having Acquired a Secondary Meaning Indicating Plaintiff as the Source of Said Hardware.

The facts are not in dispute as to defendants' copying of both substance and the form of plaintiff's hardware. Defendants copied all the non-functional features along with all the functional ones. Under the cases this is unfair competition.

Defendants' conduct in also copying and using in their literature plaintiff's pictures and cuts is also unfair competition.

These acts resulted in confusion in the trade and palming off of defendants' products as those of plaintiff.

## ARGUMENT.

### I.

**The Infringement of Defendants Was Willful Since They Deliberately and Knowingly Copied Plaintiff's Hardware in All Essential Particulars Including Each and Every Element of the Complete Combination Set Forth in Detail in the Claims in Suit.**

The complete appropriation by defendants of plaintiff's hardware in its entirety is readily apparent from an inspection of the sets themselves [Exhs. 2 and 5], and the photographs [Exhs. 7, 8 and 9; R. 361-366]. Shortly after plaintiff's hardware, Exhibit 2, and defendant's hardware, Exhibit 5, had been introduced in evidence, the Court queried counsel for defendants concerning said exhibits as follows [R. 43]:

“The Court: Mr. Beehler, will you come up here and show me where the difference is between the two exhibits? (Exhs. 2 and 5.)

Mr. Beehler: There isn't any essential difference.

The Court: All right.”

Counsel could not of course have responded otherwise, because on their face, the two sets of hardware are practically identical.

The hardware manufactured and sold by the defendants is more than a “Chinese copy” of plaintiff's hardware; it is element by element a complete copy, even down to the dimensions.

Halopoff admitted [R. 74, 75] that he got a set of hardware from Vimcar and found it to be the same as Sturdee (Fowler). There can be no question whatsoever but that at Vimcar's request, Halopoff deliberately copied the Sturdee set of hardware sold by plaintiff to Vimcar.

As seen in the photograph Exhibit 7, [R. 362], defendant's hardware comprises a jamb bracket 11 pivotally mounting a master arm 12 intermediate its ends. One end of this master arm is pivotally connected to the side rail 13. An extendible cantilever arm identical to plaintiff's is pivotally anchored at one end to the jamb bracket while the opposite end of this arm is pivotally connected to the door rail 13. Defendants' cantilever arm, like plaintiffs', is formed of a pair of link members (upper link 14a, lower link 14b). The upper link 14a has a pair of longitudinal slots 14c for receiving bolts to be passed through apertures in the lower link 14b, all as recited in detail in all of the claims.

Defendants' cantilever arm is not only structurally identical to that of the patent in suit, but it is used to accomplish the same function in the same way. As the length of the cantilever arm can be varied, the angular position of the door relative to the master arm may be adjusted to move the door into the desired vertical plane within the door frame.

Plaintiff at the trial showed that the claims of the patent in suit, narrow as they are, read as clearly upon

defendants' hardware as they do upon the hardware shown in the patent. No evidence was introduced by defendants to show non-infringement of the claims of the patent in suit and, in fact, no defense could have been raised by defendants going to non-infringement of the patent.

The voluminous testimony and exhibits introduced by defendants concerning the prior art show conclusively that the art has been for a long time, and now is, very crowded. Overhead door hardware generically is quite old. Most of the advances therein have been minor, but the Patent Office has consistently granted narrow patents on said improvements, strictly limited however to the precise advance made in the art.

This policy was adhered to by the Patent Office in this case, for an inspection of the Fowler claims immediately shows that each of said claims includes all of the operative structure shown in the drawing of the patent. In other words, the patent in suit has only narrow, detailed claims which specifically cover plaintiff's modest advance in the art, and nothing else.

The defendants' appropriation of plaintiff's structure is so complete that defendants' hardware includes each and every element recited in plaintiff's narrow claims and infringes them both in word and spirit. Since said copying by defendants was knowing and deliberate, it is therefore willful, and entitles plaintiff to exemplary damages.

## II.

**The Plaintiff's Invention Defined by the Claims in  
in Suit Is a New and Meritorious Combination of  
Elements, Which Combination Provides Adjust-  
ment of the Door in a Different and Better Way,  
And Exhibits More Than the Ordinary Skill of  
Workers in the Art. This Is Patentable Invention  
Under the Law.**

It is well established that patentable invention may reside entirely in a new combination of old elements when either a novel and useful result is produced by the joint action of the elements, or an old result is provided by the joint action in a more advantageous way.

“A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But, whether new or old, the combination is a means—an invention—distinct from them.”  
*Leeds & Co. v. Victory Talking Mach. Co.*, 213 U. S. 302, 318.

In a combination patent, whether the individual elements are separately patentable or unpatentable is immaterial. They may all be old, but together they can form a new and patentable combination. The law looks not at the individual elements of the combination, *but only to the combination as a whole, distinct from its parts.*

Plaintiff does not claim as his invention an adjustable arm *per se*, nor does he claim to be the inventor broadly of an adjustment featuring a pin and slot connection, even though he was the first to use these elements in

jamb hardware to adjust the vertical position of the door. Plaintiff instead claims as his invention a new combination of elements, which combination includes as one element an arm adjustable in length, which co-acts with the other elements to form a unitary means which produces a desired result in a materially better way. The hardware defined in detail by each of the claims in suit *is an entirety*, the integrated parts of which co-act together in a more advantageous way to produce a result long sought by the industry.

In *Webster Loom v. Higgins*, 105 U. S. 580, the Court said:

“It may be laid down as a general rule, though perhaps not an invariable one, that *if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.* It was, certainly, a new and useful result to make a loom produce fifty yards a day, when it never before had produced more than forty; and we think that the combination of elements by which this was effected, *even if those elements were separately known before*, was invention sufficient to form the basis of a patent.” (Emphasis added.)

The Court of Appeals in this Ninth Circuit has consistently followed the rule laid down by the Supreme Court in *Webster Loom Co. v. Higgins*, *supra*, that a new combination of elements coacting to produce a new result, or an old result in a new and better way, even if those elements were separately known before, is invention.

*Payne Furnace & Supply Co., Inc. v. Williams-Wallace Co.*, 117 F. 2d 823, 48 U. S. P. Q. 575;



*Page v. Mayers*, 155 F. 2d 57, 69 U. S. P. Q. 53;  
*Faulkner v. Gibbs*, 170 F. 2d 34, 79 U. S. P. Q.  
158;

*Bianchi v. Barili*, 169 F. 2d 793, 78 U. S. P. Q. 5;  
*Refrigeration Engineering, Inc. v. York Corp.*,  
168 F. 2d 896, 78 U. S. P. Q. 315;

*McCullough v. Kammerer Corp.*, 138 F. 2d 482,  
59 U. S. P. Q. 263.

“New results” of a combination are not limited to a different technical result, but this term, as applied to a combination, includes a better result or a more facile or economical operation. The term has always been used by the Courts in its broad sense.

In *Cantrell v. Wallick*, 117 U. S. 689, the Supreme Court said:

“\* \* \* So a new combination of known devices, whereby the effectiveness of a machine is increased, may be the subject of a patent. *Loom Co. v. Higgins*, 105 U. S. 580; *Hailes v. Van Wormer*, 20 Wall. 353.”

The rule stated in the foregoing cases has become part and parcel of our patent law, and is still the law. It is grounded in equity and logic, and has never been deviated from in principle.

**A. Plaintiff's New Combination Is Meritorious and Amply Meets All of the Tests of the Foregoing Cases.**

The concept of using in jamb hardware a cantilever arm of adjustable length, together with means for adjusting the length of the arm to obtain the desired adjustment of the door after it is hung is a novel combination.

The evidence clearly shows that the combination specifically defined in detail by each of the claims of the patent in suit contributed to a more facile and efficient adjustment of the door, which adjustment, once made, would not fail even with hard usage. This is clearly a beneficial result within the meaning of the foregoing cases.

The beneficial result obtained by the combination of the claims of the patent in suit is outstanding. The testimony of Bayless [R. 280], Burton [R. 276], Krieger [R. 278], Walizer [R. 284, 285] and Mr. McFadden [R. 148, 149], all experienced door hangers, is uncontradicted as to this fact. They all testified to the excellence and popularity of plaintiff's hardware, and stressed the advantage of its ability to stay in adjustment. They all testified that plaintiff's hardware provided for the first time jamb hardware which was both simple to install and plumb, *which did not fail in use*.

Perhaps the best evidence of the outstanding merit of plaintiff's hardware over others on the market is the admitted fact that defendants' having all of the other types and makes of hardware available to them, chose to and did copy plaintiff's hardware.

That the combination recited in detail in plaintiff's claims is new as well as meritorious is apparent from the fact that there is not one piece of evidence in the whole record, either patents, publications or structure, that shows jamb hardware employing a two-piece extendible

cantilever arm for plumbing the door in the doorway. True, many other devices and methods are shown in the prior art for plumbing overhead doors, but they all accomplish the end result in a different way, and, so the evidence shows, an inferior way.

**B. Plaintiff's Invention Is the Result of Patentable Ingenuity Clearly Rising to the Dignity of Invention in This Crowded Art.**

The evidence conclusively demonstrates that the combination defined by the claims of the patent in suit was a real and distinct advance in the art and the result of patentable ingenuity. It was far more than the expected skill in the art.

In *Kirsch Mfg. Co. v. Gould Mersereau Co., Inc.*, 6 F. 2d 793, the Circuit Court of Appeals, Second Circuit said:

“An invention is a new display of ingenuity beyond the compass of the routinier, and in the end that is all that can be said about it.”

It has been repeatedly held that simplicity does not negative invention but often shows it. The invention defined by plaintiff's claims here in suit was the result of ingenuity far beyond “the compass of the routinier.” Plaintiff's solution of the problem now appears simple, but this is always true when a development is viewed in hindsight.

As the Supreme Court said in *Goodyear v. Ray-O-Vac*, 321 U. S. 275, 279:

“Viewed after the event, the means Anthony adopted seemed simple and such as should have been obvious to those who worked in the field, *but this is not enough to negative invention.* \* \* \* Once the method was discovered it commended itself to the public as evidenced by marked commercial success.”

That plaintiff's invention was not obvious to those skilled in the art is evidenced by the lapse of time from the introduction of jamb hardware in about 1939 [R. 263] to plaintiff's invention in late 1948 or early 1949. Even after the Tavart hardware in 1945 had shown a partial solution of the problem of door adjustment in jamb hardware, it did not occur to those familiar with the Tavart device that the union of elements making up plaintiff's combination would solve the problem in a materially better way.

The effect of the passage of time after the need and before the invention is many times in and of itself evidence of invention.

See:

*Eibel Process Company v. Minnesota & Ontario Paper Co.*, 261 U. S. 45;

*Schering Corp. v. Gilbert*, 153 F. 2d 428, (C. C. A. 7) 68 U. S. P. Q. 84.

That plaintiff's invention was the result of patentable ingenuity is further evidenced by the unsuccessful efforts of other workers in the same field to solve the same problem. As stated in *Wilcox v. Bookwalter*, 31 Fed. 224, at 229:

“As Justice Matthews said in *Hollister v. Benedict Manufacturing Co.*, 113 U.S. 73, there must be ‘something more than the expected skill of the calling’, *but when we come to determine what that is, or rather what it was at the date of the alleged invention,—for the standard of that date is the test, we must, if we proceed intelligently, consider what those engaged in that calling were seeking to accomplish, and what they were, by their skill, actually accomplishing.*” (Emphasis added.)

It is clear from the testimony of both plaintiff's and defendants' witnesses that those engaged in the manufacture of overhead door hardware were seeking but failed to evolve a jamb hardware providing satisfactory door adjustment.

The witness McFadden testified that it was not obvious to him and, as to plaintiff's hardware embodying the combination of the patent, he testified—“*It is the best there is, no doubt in my mind about it.*” [R. 148.]

Defendants' witness Winchel testified as to several sets of hardware manufactured by him [Exhs. G, H and I; R. 410-417] but his testimony clearly shows that he and his co-workers long sought but failed to accomplish what plaintiff did accomplish. Even after years of work

in the field, Winchel never found a real solution of the problem solved by plaintiff.

Defendants showed by the witness Matlin that plaintiff's ex-employee Murphy also worked on the problem. But Murphy likewise failed to evolve plaintiff's successful combination, instead producing an entirely different hardware. [Exhs. R, and R-1; R. 480, 481.]

As stated by this Court in *Park-In Theatres, Inc. v. Rogers, et al.*, 130 F. 2d 745, 55 U. S. P. Q. 103, 105:

“The issuance of the patent is presumptive evidence of invention and patentability. The presumption is so strong that in the event of a reasonable doubt as to patentability or invention, that doubt must be resolved in favor of the validity of the patent. (*Mumm v. Decker*, 301 U. S. 168, 171. See, also, *Frank v. Western Electric Co.*, 24 F. 2d 642, 645.)”

This rule was re-stated in *Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*, 151 F. 2d 91, 66 U. S. P. Q. 396, 399, wherein this Court further held that the burden of establishing the invalidity of the claims rested on the appellants (defendants), the Court stating:

“All these claims were for combinations. Appellants alleged, in substance and effect, that these combinations were not new, and that therefore the claims were invalid for lack of novelty. The question thus presented was one of fact. *On this question, appellants had the burden of proof.*” (Emphasis added.)

III.

**None of the Prior Art Evidence Anticipates the Claims in Suit, Which Are Specific to Plaintiff's Jamb Hardware as Shown and Described in His Patent, nor Does Said Evidence Negative Invention in Plaintiff's Jamb Hardware, for There Is no Teaching in Any of Said Art of Plaintiff's Means for Securing His Superior Results.**

The Trial Court's Minute Order, the Findings, and the Conclusions are all silent as to what prior art the Court relied on in giving judgment for defendants herein.

It is obvious that many of the prior art patents and public uses introduced in evidence are so remote from the subject matter defined by the claims that the Court could not possibly have given that art credence. But where the Court drew the line we cannot tell. Since we do not believe that any of the prior art evidence anticipates or negatives the plaintiff's invention, we are somewhat at a loss as to how to treat the art in this our opening brief.

It has always been held that the claims of a patent measure and define the invention. As was said by the Supreme Court in the famous *Paper Bag* case, *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 419,

“\* \* \* the claims measure the invention. They may be explained and illustrated by the description. They cannot be enlarged by it.”

See also. *Schriber-Schroth v. Cleveland Trust Co.*, 311 U. S. 211, 217.

Since none of the prior patents or uses introduced in evidence by defendants shows or teaches the combination described in the claims in suit, we must conclude that the

Trial Court temporarily lost sight of the foregoing rule stated in the *Paper Bag* case, and held invalid, a much broader claim than appears in the patent.

The cases are legion that the defense of anticipation, *i.e.*, lack of novelty, is established only by proof that the entire combination described by the claims existed as an entirety prior to the patentee's invention thereof. *There is no such proof here.*

Likewise, it is settled law that the defense of want of invention is established only by proof that what the patentee created involved merely the exercise of the mechanical skill expected of those in that particular art. *There is no such proof here.*

The rule has long been established that a combination is novel within the meaning of the patent law *unless the complete combination, i.e., all of its elements*, can be found in a *single* prior description, patent, or structure, in which all the elements *do the same work in substantially the same way.*

As said by this Court in *Pointer v. Six Wheel Corp.*, 177 F. 2d 153, 83 U. S. P. Q. 43, 49:

“By the same token, invention cannot be defeated merely by showing that, in one form or another, each element was known or used before.” (Citing cases.)

“*The question is:* Did anyone before think of combining them in this manner in order to achieve the particular unitary result,—a new function? If not, there is invention. *Keystone Mfg. Co. vs. Adams*, 1894, 151 U. S. 139; *Lincoln Engineering*



*Co. vs. Stewart-Warner Corp.*, 1938, 303 U. S. 545, 549 (37 U. S. P. Q. 1, 3).

“At times, the result is accomplished by means which seem simple afterwards. But, *although the improvement be slight, there is invention, unless the means were plainly indicated by the prior art. Paraffine Companies v. McEverlast, Inc.*, 1936, C. A. 9, 84 F. 2d 335, 341 (30 U. S. P. Q. 106, 111).”

In *Holmes v. Atlas Garage Door Co.*, 54 Fed. Supp. 368 (60 U. S. P. Q. 280), So. Dist. Calif., Judge Yankwich in holding the Holmes overhead door hardware patent [Exh. U-9; R. 522] valid, said:

“It is a patentable combination which achieves a new and better result not attained by any device in the prior art. *Even if the elements of novelty be, as contended by the defendants, limited to the arcuate slot nut and bolt, in order to achieve flexibility and adjustability, the combination of these elements with the others is patentable invention.* \* \* \* The fact that each of these elements may exist, separately in one form or another, in the prior art does not invalidate the patent in suit.” (Emphasis added.)

Plaintiff's new combination in jamb hardware of a jamb bracket pivotally mounting a power arm intermediate the ends thereof, with means for pivotally connecting one end of the power arm to a garage door through a rail mounted to the door, and *a cantilever arm of variable length* with means for pivotally connecting one end of the cantilever arm to the jamb bracket

*a fixed distance from the pivotal connection of the power arm to the bracket, and with the opposite end pivotally connected to the door through the rail, is not shown or described in any printed publication or patent, or embodied in any prior device. As said in Bates v. Coe, 98 U. S. 31, 48:*

“Where the thing patented is an entirety, consisting of a single device *or combination of old elements*, incapable of division or separate use, *the respondent cannot escape the charge of infringement* by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine, and another part in another prior exhibit, and still another part in the third one, \* \* \*”

See also, the late case in this Circuit of *Faulkner v. Gibbs*, 170 F. 2d 34, affirmed by the Supreme Court in 338 U. S. 267, where the Gibbs patent for an electrified bingo game was held valid even though all elements of the claims were admittedly old. In sustaining this Court’s previous holding of validity, the Supreme Court said at page 268, “In the instant case the patent has been sustained *because of the fact of combination* rather than the novelty of any particular element.”

**A. The Prior Art Patents Do Not Invalidate Plaintiff’s Patent.**

The prior art patents introduced by defendants [Exh. U; R. 489] do not anticipate nor even suggest plaintiff’s combination. Not one of them discloses the union of elements making up the combination set forth in detail in plaintiff’s claims, nor do the prior patents, even when taken together, teach that combination. In fact, most of the patents forming defendants’ Exhibit U, and particularly those relied on at the trial, *do not even show jamb-*

*type hardware*. All of the patents discussed by defendants' expert Coulter show *pivot type hardware*. [R. 220.]

Pivot type hardware and jamb hardware are *entirely different types of hardware*, each with their own and different problems. This was confirmed by Varley, general manager of Tavart [R. 274], and the door hangers Krieger [R. 279], Bayless [R. 280], and Walizer [R. 286.] Krieger testified [R. 279]:

“They are two different sets of hardware. They both open the door overhead, but there is no similarity between them.”

Defendants' expert Coulter, *admitted they were different* [R. 221], and a mere casual inspection of the patents *shows that they are different*.

Pivot type hardware comprises generally a pair of supporting arms rigidly interconnected to form a U-shaped wishbone structure which is pivotally mounted at its apex to the side walls of the garage or some supporting structure fastened to the walls.

A representative set of this type of hardware is shown by the Coffey Co. brochure [R. 406] “Easy Pivot Model,” and Patent No. 2,166,898 to Wolf. [Exh. U-5; R. 504.] Referring to the drawing of the Wolf patent, which is typical of the rest, we see that it discloses a pair of door supporting members, each including a pair of diverging arms 3 carried by a casting 6, pivoted at 4 to a support 8 fixed to the side walls of the garage, so that the arms move as a rigid unit from the dotted line position of Fig. 2 of the patent to the solid line showing of the figure.

In pivot type hardware, the arms must be adjusted to accomodate the varying distances between the side

walls of the garage and the adjacent door jambs. This is termed the “*offset*” *adjustment*, and the Wolf patent discloses a pivot type hardware in which the arms 3 are adjustable in length to adjust to *varying offsets* such as pictured in Fig. 1 of the drawing of this patent. By forming the arms 3 extendible in length the hardware of the Wolf patent could be used as the supporting means for a door even though the “*offset*” at opposite sides of the door frame was different. *But this is an entirely different problem from the one solved by plaintiff. In jamb hardware there is no offset problem.*

This *offset* adjustment is also provided in the patents to Holmes, No. 2,228,314 [R. 522], Peck, No. 2,233,638 [R. 527], Violante, No. 2,425,905 [R. 545], and Wread, No. 2,441,742. [R. 550.]

*But there is no door adjustment of the type here in issue available in the pivot hardware shown in the Wolf patent and others introduced by the defendants, nor in the Coffey Easy Pivot Model. [R. 406.]*

With respect to the Coffey Easy Pivot Model [R. 406], defendants’ expert Coulter testified [R. 195] that it was possible to shift the door “a little bit” by varying the length of the wishbone arms. *What he left unsaid*, is the very obvious fact that this adjustment could *not be accomplished without unfastening the arm brackets from the door, or warping the door out of shape.* Consequently, this hardware is no more pertinent to the issues of this case than is the old style “Standard” loose cantilever arm type hardware made by Halopoff before he started copying plaintiff’s hardware.

With respect to the Wolf patent, Mr. Coulter testified in the affirmative in answer to the question, “Could the door hung by hardware as pictured in the Wolf patent

be adjusted so as to make it vertical in the doorway?" [R. 196.] Again, *what he left unsaid*, was the fact that this *alleged adjustment cannot be accomplished without either disconnecting the arms from the door, or warping the door by brute force and awkwardness to accommodate the change in length and change in angle between the arms and the door.* The failure of Mr. Coulter to state these facts is not surprising however, since as mentioned, a door hung by pivot hardware such as shown in the Wolf patent cannot be adjusted to make it vertical in the doorway by merely lengthening or shortening the arms 3.

Similarly, Mr. Coulter when he testified in respect to the Holmes patent No. 2,228,314 [R. 522] said that loosening the set screws 11 "*allows you to either extend the hardware further to the wall, or either extend the door forward or back or perpendicular, or whatever is necessary.*" [R. 198.] Yes, it "*allows*" adjustment, but only if other things are done. Here again, referring now to Fig. 1 of the drawing of the Holmes patent, if the lower arm was lengthened in an effort to move the bottom of the door out, as in the example above mentioned, the door could not be plumbed, *for again there is no means in Holmes to vary the angle subtended by the upper arm and the inner face of the door.* The same is true of the other pivot type patents.

In no pivot hardware of the prior patents introduced by defendants can a door be plumbed by merely adjusting the length of one or the other or both of the diverging supporting arms of the hardware.

*The Holmes patent No. 2,259,819 [R. 536] as well as the Wolf [R. 504] and Wread [R. 550] patents were all considered by the Examiner in the Patent Office during the*

*prosecution of the application which issued into the patent in suit.* The Patent Office considered the claims of plaintiff's patent to be patentable over these prior patents showing *pivot type* hardware, and rightfully so, for those patentees were not confronted with the problem which the plaintiff has so successfully solved in the field of *jamb type* hardware. It is significant that neither the Court's decision nor the findings identifies any of the prior patents as a basis for the decision.

It is axiomatic that every patent carries a presumption of validity from the fact of its issuance. *Hunt Bros. v. Cassidy* (C. C. A. 9), 53 Fed. 257, and the burden of proving invalidity of a patent is on the defendant, *San Francisco Cornice Co. v. Beyrle* (C. C. A. 9), 195 Fed. 516, 518.

The combination claims of the Fowler patent in suit are therefore, as a matter of law, presumptively valid. Defendants have the heavy burden of overcoming this presumption. In attempting to do so, they have presented testimony as to six prior patents showing "pivot type" hardware, which they say overcomes the presumption of validity attached to plaintiff's patent on "jamb hardware." But of these six patents, *three were considered by the Patent Office*, and plaintiff's claims were allowed thereover. These three file wrapper references, Wolf, Holmes and Wread, have no probative value here whatsoever.

It is firmly established that the presumption of validity attaching to a patent from its issuance is so strengthened by the fact that the patents pleaded against it were considered by the Patent Office, as to become an almost un rebuttable presumption. Unless defendants can find art closer to plaintiff's patent than that cited by the Patent

Office, the defendants fail in their attack on the validity of plaintiff's patent.

*Mohr & Son v. Alliance Securities Co.* (C. C. A. 9), 14 F. 2d 799;

*Nordberg Mfg. Co. v. Woolery Mach. Co.* (C. C. A. 7), 79 F. 2d 685;

*Gulf Smokeless Coal Co. v. Sutton Steel* (C. C. A. 4), 35 F. 2d 433.

More important, however, is the fact that no *pivot type* hardware is a good reference against *jamb type* hardware, since the problems are different and the structures are different.

**B. The Validity of Plaintiff's Patent Has Not Been Affected by the Prior Uses Introduced in Evidence by Defendants.**

Defendants in support of their allegation of invalidity have relied principally on alleged prior use of hardware manufactured by Tavart Company, King Overhead Door Co., and Winchel Manufacturing Co.

The early Tavart hardware appears to embody specifically the disclosure of the *Smith patent* [Exh. T; R. 484], and it is to be noted that the Smith patent, like the patent herein suit, covers a new combination of old elements. As previously mentioned, the Smith and Fowler patents were co-pending without any interference being declared. Obviously, the Patent Office did not consider that there was any conflict between them.

The adjustment of a door with hardware of the Tavart type is brought about by *shifting the location of the pivotal connection of the end of the cantilever arm mounted on the jamb bracket*. The record is replete with testimony showing that this hardware did not provide adjustment without creating new problems for the indus-

try. The inherent defect in the Tavart type hardware resides in the fact that it is impossible to permanently anchor the pivotal connection of the cantilever arm on the jamb bracket by means of a shiftable pin mounted in a slot.

Coulter testified [R. 186, 213, 214] that maximum tolerances of  $\frac{1}{8}$ " had to be maintained in hanging doors with jamb hardware. In other words, if the pivot slipped  $\frac{1}{8}$ " the door would be too much out of plumb, and would need adjusting.

Varley, manager of Tavart, said [R. 268], "The adjustment is *very critical*. It doesn't take usually an eighth of an inch, or something, to make it work." Thus, we see that Varley confirms Coulter's testimony that if Tavart hardware gets out of adjustment *as little as  $\frac{1}{8}$ "*, it must be serviced.

One need not be a professional door hanger to see from a mere casual consideration of the Tavart hardware, that the testimony of Krieger, Walizer and Bayless and of Varley himself, that Tavart hardware often gets out of adjustment, is obviously true, since in the Tavart construction, two mutually exclusive things are attempted. First, *the pivot pin must be shiftable* for adjustment, and second, *it must be rigidly secured* to withstand shock. How can it do both satisfactorily? Obviously, it cannot and does not, when an  $\frac{1}{8}$ " slip renders the door inoperative.

The foregoing problems are entirely avoided by the Fowler structure. Fowler has *fixed pivots*, and when his links are cinched up they stay cinched. It is apparent that the principle of the Tavart mechanism is *totally different* from the principle of plaintiff's combination. As



the witness Varley testified [R. 268], plaintiff gets his adjustment in a “different way” from that employed by Tavart.

This fundamental distinction between the Fowler system and the Tavart system is recognized in the Fowler claims which specify that the pivot pin connecting plaintiff’s cantilever arm to the jamb bracket is located at a point “*fixedly spaced*” from the pivot pin of the power arm, *i.e., the claims expressly exclude any hardware wherein the pivot point of the cantilever arm is shiftable as it is in Tavart.* [See Exh. 4, Claim 1, element e.]

All of the defendants were well aware of the Tavart hardware at the time they copied plaintiff’s hardware here in suit. for Vimcar had handled Tavart hardware before it handled plaintiff’s hardware [R. 89]; and *Halopoff had a Tavart set in his shop when he chose a design for Vimcar.* [R. 70.] *Yet he slavishly copied plaintiff’s hardware,* taking nothing from the Tavart design.

The defendants seek to belittle plaintiff’s hardware, but with all of the prior hardware, including Tavart, Winchel, King and Coffey before them, *defendants copied plaintiff’s hardware, element for element.* As so aptly said by the Court of Appeals, Eighth Circuit, in *Strong-Scott v. Weller*, 112 F. 2d 389:

“Efforts of infringers, who professed to think little of the merits of the infringed device over the prior art, *to keep on making and marketing the device as theirs, is the sincerest tribute which they could pay to the patentee.*”

Paraphrasing this Court’s language in *McCullough v. Kammerer Corp.*, 166 F. 2d 759, 76 U. S. P. Q. 503, 513, “it plainly appears that the defendant,” Halopoff,

“busied himself in the work of preserving and promoting his own special brand of free enterprise, by calmly appropriating another man’s original and patented idea.”

The early Winchel hardware [R. 410] is not relevant to the issues here for his cantilever arm, as in the Standard hardware [R. 409], was not connected to the door rail. Whether it also had a horizontal slot in the jamb bracket is immaterial since Fowler has no slot or shiftable pin on his jamb bracket.

The Winchel hardware shown in Exhibit H [R. 414] was, by his own testimony [R. 105], not successful and died aborning. More important, is the fact [R. 122, 123] that this hardware had no means whatsoever for adjusting the door. Its only relevancy, like most of the other prior-use testimony, is to show the long unsuccessful struggle of these experts in the art to try and solve the problem solved by plaintiff.

Winchel’s hardware shown in Exhibit I [R. 417] was similar to his earlier hardware in that the jamb bracket was formed with a horizontal slot. It likewise has nothing to do with this case.

The Winchel hardware shown in the brochure [Exh. J, R. 420, 421] and further illustrated in the photograph [Exh. L, R. 423] *was not proved to be prior to plaintiff’s invention in suit.* Winchel was very hazy as to when this hardware was first built [R. 114] or when it was introduced to the trade. [R. 113.] In answer to several questions [R. 120] he said that the hardware was introduced “around 1948—someplace, the first of 1949, I don’t know just off-hand.”

This kind of vague testimony does not carry the defendants’ heavy burden to show the dates of alleged prior

uses beyond a reasonable doubt. Furthermore, while defendants laid a foundation to bring in other witnesses to clear up Winchel's dates, *no such witnesses were produced*. Winchel testified [R. 112] that his distributors Stevens and Thuet were "the first purchasers" of said hardware. But no one from Stevens and Thuet appeared to clarify Winchel's "guesses" as to the effective dates of his Lo-9 hardware shown in Exhibits J and L.

Furthermore, with these exhibits as with all his others, he didn't know when the exhibit was printed [R. 113]. None of these exhibits was proven, and they are only in evidence to illustrate Winchel's vague and unsupported testimony as to what he did at some uncertain time.

Even if it had been proven that Winchel's Lo-9 hardware [R. 42] was prior to plaintiff's invention, still this hardware did not anticipate or teach the combination of the claims in suit. Plaintiff's claims are drawn *specifically to the particular combination shown in the drawings of plaintiff's patent*. This hardware of Winchel's having a one-piece *inextensible* cantilever arm, and a gusset plate *shiftable* mounted to the door rail, clearly cannot affect the validity of the combination claims of plaintiff's patent built around his *extensible* cantilever mounted on *fixed* pivots. That this Winchel hardware did not adequately solve the problem plaguing the industry is fully shown by the testimony of the witnesses Burton [R. 276], Bayless [R. 280] and Coulter [R. 216].

The hardware [Exh. N] manufactured by King Overhead Door Co. (McFadden) does not anticipate the claims or teach the invention of the patent in suit since the particular union of elements of the patent in suit is not present in this hardware. McFadden's hardware provides some door adjustment in somewhat the same

fashion as Winchel [R. 131], but this does not negative the novelty or invention of plaintiff's different combination defined by the claims of the patent in suit.

Although there was no evidence at all as to exact dates (Matlin's confused testimony) it would appear that somewhere about the time plaintiff introduced his hardware embodying the invention of the patent in suit, a former employee of plaintiff, one Earl Murphy, produced a jamb type hardware using a slotted door rail. This hardware is purported to be shown by the Matlin photographs [R. 480, 481]. However, these photographs clearly show that Murphy's hardware, even if prior to the date of plaintiff's invention, does not disturb the claims of the patent. It was merely a variation of Winchel's Lo-9, no better and probably worse.

The rule that a defendant, particularly an admitted infringer, has a very heavy burden of proof in attacking the validity of a patent, has long been established. As said by the Court in *Williams v. United Shoe Machinery*, C. C. A. 6, 121 F.2d 273, 50 U. S. P. Q. 264,

“\* \* \* One otherwise an infringer who assails the validity of a patent fair on its face bears a heavy burden of persuasion, and fails, unless his evidence has more than a dubious preponderance. *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385, 391; *Radio Corp. v. Radio Labs*, 293 U. S. 1, 8.”

The U. S. Supreme Court in the *Barbed Wire* case, 143 U. S. 275, 284, held that novelty can only be negated by proof which puts the fact beyond a “reasonable doubt.” As discussed by the Court in that case, this rule is particularly applicable, where as here, the evidence consists of mere unsupported oral testimony.

IV.

**The Hardware Shown in the Earlier Filed But Later Issued Fowler-Murphy Patent Does Not Anticipate or Teach the Invention of the Fowler Patent Here in Suit Since It Has No Means to Adjust the Vertical Position of the Door Without Disconnecting the Cantilever Arm From the Door and Repositioning it. Furthermore, Since Said Joint Patent Was Co-pending, It Is Not Prior Art.**

On its face, the joint Fowler-Murphy structure did not, and does not, disclose, teach, or anticipate the Fowler invention as defined by the claims in suit. The Fowler-Murphy joint patent shows a different type of hardware, similar to the old "Standard" and early Winchel varieties.

The patent in suit discloses and claims jamb hardware having a cantilever arm (link 14), one end of which *is connected directly by a pivot pin to the jamb bracket 11*, while the opposite end *is connected to the side rail 13*.

Claim 1 of the patent in suit defines this structural arrangement by the following specific language:

a link of adjustable length;

a pivot pin pivotally connecting a first end of said link to said bracket at a point fixedly spaced from the pivotal mounting of said arm to said bracket; means for pivotally connecting the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal connection between said arm and door;

The Fowler-Murphy patent, Exhibit O [R. 425], does not anticipate this claim, or any other claim of the patent in suit, for the simple reason that the cantilever arm 15 of the joint patent is connected, *not to the bracket 11*

as defined by the claims in suit, but to a “positioning lever” 14. The positioning lever 14 is not part of the cantilever arm. The cantilever arm 15 of the joint patent is connected, *not to the side rail 13 as shown in the patent in suit, but to a bracket separate from the side rail 13.*

It is thus obvious that the hardware of the joint patent is entirely different from the hardware here in suit. It does not have the structure called for by the claims in suit, and it does not perform the same work as the structure defined by the claims. Plaintiff is not claiming cantilever arms, *per se*; he is claiming a particular cantilever arm mounted in a particular way to perform a particular function.

The hardware of the Fowler-Murphy patent was developed to provide a closure structure in which certain members were extensible or contractible “to accommodate doors or closures of various lengths or heights.” As jamb hardware is actually a mechanism for balancing a door within a doorway, the Court will readily understand that hardware proportioned to balance seven foot doors cannot be used to balance eight foot doors. To solve this problem, Fowler and Murphy tried to devise hardware in which certain members could be extended to handle an eight foot door, and contracted to accommodate a seven foot door.

There is no disclosure in the joint patent of means to push the lower portion of the door out, or pull said

portion in, to adjust the vertical position of the door. In fact, no adjustment of this type was necessary in the hardware of the Fowler and Murphy patent, for the “second end” of its cantilever arm 15 is not attached to the side rail at all, but is anchored to the door at whatever distant point is necessary to locate the door properly within the doorway. In this respect, the hardware of the Fowler-Murphy patent is not different from the very first jamb hardware produced by plaintiff and exemplified in Exhibit 25 [R. 398].

The hardware of the Fowler and Murphy patent is not only different in all major particulars from the hardware of the patent in suit, but the inventive concepts of the two patents are entirely different. Clearly, the joint Fowler-Murphy patent cannot be said to anticipate or teach the invention described in the claims of the patent in suit.

While, as pointed out above, the Fowler-Murphy patent has no relevancy to this case since it does not show or suggest either the problem or the solution thereof described and claimed in the patent in suit, it should also be noted that the Fowler-Murphy patent is not properly part of the prior art and therefore should not have been even considered by the Court.

The general rule is that an inventor by describing but not claiming an invention in a patent granted to him, *upon issuance of the patent*, dedicates the matter described but not claimed therein. The issuance of the patent has no such effect, however, when the matter thus

described but not claimed was the subject of a co-pending application in the Patent Office by him. This was early established and explicitly adjudged in *Suffolk v. Hayden*, 70 U. S. 315, 18 L. Ed. 76 and recognized as sound doctrine in the *Barbed Wire* case, 143 U. S. 275, 36 L. Ed. 158.

The question of dedication cannot be raised here for plaintiff's patent No. 2,523,207, although resulting from an earlier filed application, issued *subsequent* to the patent in suit and was therefore *co-pending therewith*. Even if patent No. 2,523,207 had issued *prior* to the patent in suit, it would not have been fatal to plaintiff so long as the applications were co-pending. As held in *Traitel Co. v. Hungerford Brass*, 22 F. 2d 259 (C. C. A. 2):

“It was not fatal if the invention of the second patent is disclosed in the earlier patent *provided it is not claimed* and the applications for the two patents were *co-pending*.” (Emphasis added.)

The well-known rule of *Milbourne Co. v. Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651, 653, that where a device is *fully and completely disclosed* in an earlier filed application, a late inventor cannot claim to be the first inventor of *that particular device*, does not apply here, since the combination defined by the claims in suit is not disclosed or even suggested by the joint Fowler-Murphy patent.

It is apparent therefore that the joint Fowler-Murphy patent [Exh. O] is not material here since (1) it does not show or teach the invention of the patent in suit, and (2) it is not a part of the prior art.



V.

**The Copying of Plaintiff's Hardware by Defendants Who Were Then Dealers Selling Plaintiff's Hardware, and the Substitution of Said Copies in Defendants' Line of Products in Lieu of Plaintiff's Hardware, Without Notice to the Trade of Such Substitution, Constituted Unfair Competition With Plaintiff Because It Resulted in Confusion of the Public and Passing Off of Defendants' Hardware as That of Plaintiff, the Form and Appearance of Plaintiff's Hardware Having Acquired a Secondary Meaning Indicating Plaintiff as the Source of Said Hardware.**

The undisputed evidence introduced in this cause shows that the defendant Vimcar, in July, 1949, after plaintiff's novel and attractive hardware embodying the invention of the patent in suit had been introduced to the trade, commenced purchasing plaintiff's hardware for resale to its customers. [R. 89.] The evidence further shows that the plaintiff in good faith and in an effort to facilitate sales of this hardware by defendant Vimcar, supplied Vimcar with instruction sheets [R. 367] from which Vimcar had copies made [R. 369, 370], photos [R. 389-392] from which Vimcar made cuts, and other sales aids.

The defendant Carter has admitted that he was not satisfied with the price the plaintiff was charging Vimcar for the hardware [Exh. 20, p. 51] and in late 1949 or very early in 1950 the defendants Vimcar and Carter and employees of Vimcar, conspired with the defendant Halopoff, to produce at a lower cost to Vimcar a substantial duplicate of the hardware then being purchased by Vimcar from plaintiff.

A conspiracy is almost always of necessity provable only by circumstantial evidence since the law recognizes the intrinsic difficulty of establishing a conspiracy by direct evidence; consequently the conspiracy complained of may be inferred from the nature of the acts complained of, the individual and collective interest of the alleged conspirators, the situation and relation of the parties at the time of the commission of the act, and generally all of the circumstances preceding and attending the culmination of the claimed conspiracy. (*Siemon v. Finkle*, 190 Cal. 611, 213 Pac. 954; *Johnstone v. Morris*, 210 Cal. 580, 282 Pac. 970; *McPhetridge v. Smith*, 101 Cal. App. 122, 281 Pac. 419.) This is necessary because it is almost impossible to secure direct evidence of a conspiracy unless, of course, one of the participants has confessed. (*Biggs v. Tourtas*, 92 Cal. App. 2d 316, 206 P. 2d 871.)

The evidence here is sufficient to show that the defendants did conspire to defraud plaintiff, and actually did carry out the conspiracy by the acts complained of, all to the damage of plaintiff.

Plaintiff's hardware, at the time Carter and agents of Vimcar induced Halopoff to copy the same, was well known to the trade as being of plaintiff's manufacture. The defendants, in slavishly copying plaintiff's hardware, *sought to induce the trade to buy that hardware from Vimcar in the belief that they were buying hardware of plaintiff's manufacture.* It must be remembered, as Carter testified, that Vimcar manufactured nothing [Ex. 20, p. 34], and that all products sold by Vimcar, were manufactured by others. Vimcar's customers are experienced purchasers [Exh. 20, p. 34] and were fully aware that products offered by Vimcar were manufac-

tured by others. They looked behind Vimcar to the manufacturer in order to ascertain the quality of the goods bought from Vimcar.

It therefore follows that customers of Vimcar purchasing hardware of plaintiff's manufacture were well aware that said hardware was manufactured by plaintiff and not by Vimcar. Such customers subsequently purchasing from Vimcar identical hardware made by Halopoff would obviously believe that it was of plaintiff's manufacture. Vimcar did not notify its customers that the hardware of the Halopoff manufacture had been substituted by Vimcar for the hardware previously sold of plaintiff's manufacture. Likewise, Vimcar did not apply any mark to the Halopoff hardware to distinguish it from the hardware of plaintiff's manufacture previously sold by Vimcar.

*In fact, everything was done that could be done, to conceal the substitution from purchasers.* This shows a deliberate attempt to confuse purchasers by the exact duplication of the hardware of plaintiff's manufacture, and to palm off the Halopoff hardware as that of plaintiff. The fact that defendants used the name Olympic did not affect the situation because the customers knew that Vimcar was merely a "distributor" and that its Olympic hardware was made by plaintiff. *It was plaintiff's good name and reputation that the buyers relied on, not the trademark Olympic.*

The cases in all jurisdictions are uniform in holding that passing off one man's goods as the goods of another constitutes unfair competition. This is sometimes referred to as the doctrine of "palming off," and is the backbone of the law of unfair competition.

In the case of trademarks and trade names, the issue is clear,—are the competing names or marks confusingly similar. So also in the usual “dress-of-goods” case, the issue is merely whether the labels, packages or containers are so similar as to confuse the purchaser as to their source. If they are, the defendant is enjoined.

The doctrine of passing-off has also been applied to confusion *in the goods themselves, where a competitor has deliberately copied distinctive or non-functional features* that have come to indicate the goods as of a particular manufacturer. And this is true even where the copier places his own trademark on the goods. The following statement from the landmark case of *Enterprise Mfg. Co. v. Landers* (C. C. A. 2), 131 Fed. 240, 241 stated the rule very well:

“\* \* \* This is a most aggravated case of unfair trading. \* \* \* Here, on the contrary, *they have not only conformed their goods to complainant’s in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a strikingly characteristic effect* \* \* \* except for the fact that on the one mill is found the complainant’s name, and on the other the defendants’, it would be very difficult to tell them apart. \* \* \*”

So also in the case of *Yale & Towne Mfg. Co. v. Alder* (C. C. A. 2), 154 Fed. 37, 38, the Court in granting an injunction in a case very similar to ours here, said:

“The defendant has with a purpose taken the *design and dress of the plaintiff’s padlock. He has carefully copied it, differentiating his own from it in minor details, probably intending to escape the*

charge of infringement; *but he has gone a step too far* when he has produced a padlock which to casual observation is substantially identical in appearance with the plaintiff's \* \* \*”

The factual situation here is well within the rule of the above cases. The situation is further aggravated by the fact that defendant Vimcar, having once sold plaintiff's hardware to customers well aware that Vimcar did not manufacture the hardware, later sold the Halopoff hardware, *using duplicates of plaintiff's mounting instructions, and picturing plaintiff's hardware in its catalogues and other selling aids*, without in any way indicating that its new hardware was manufactured by Halopoff. The sales aids all depict hardware manufactured by the plaintiff and substantially all the pictorial illustrations were made from photographs taken by plaintiff of his hardware and supplied to Vimcar at the latter's request. [R. 54, 57.]

A competitor may not copy “non-functional” features, whether ornamental or not. Stated otherwise, the copying *must be necessary to the functional requirements of the elements, and unless the “form” copied is necessary to “function”* it should be enjoined.

“The defendant's appropriation of this combination, and placing it upon the market, has been unfair and calculated to receive the ordinary purchaser who would not be apt to discover the difference. *His advertising it as his own product, after carefully copying it and differentiating it only under another name, is not sufficient to relieve it of the charge of unfair competition.*”

*Bayley & Sons, Inc. v. Brounstein Bros. Co.*,  
246 Fed. 314 at p. 318 (D. C. N. Y., 1917).

Defendants here have not merely copied the functional elements of plaintiff's hardware, but they have slavishly copied all features, *functional and non-functional* to the extent that even a skilled observer can hardly tell the difference between defendants' hardware and that of plaintiff.

In the case of *Luminous Unit Co. v. R. Williamson & Co.*, 241 Fed. 265 at p. 269 (D. C. N. D. Ill.) (aff'd 245 Fed. 988) (D. C. Ill., 1917), which was a suit for infringement of two patents on electric lighting fixtures, and for unfair competition for copying the non-functional features thereof, the Court said:

“The unique and attractive style of the *Braskolite* indicates origin in the most effective way, but defendant calmly takes it over, and then protests that there is no proof that the public is deceived. That confusion in the minds of dealer and buyer should have resulted *was inevitable*.

\* \* \* \* \*

“I think it is established by the proof that *defendant did not in good faith use reasonable diligence to avoid deceptive resemblances which might mislead the trade*, and that plaintiff is entitled to injunction and damages.” (Emphasis added.)

The evidence clearly shows that purchasers of hardware have accepted jamb hardware with a two-piece cantilever arm of adjustable length shaped as in plaintiff's hardware as indicating that that hardware is a product manufactured by plaintiff. [R. 288, 278, 280, 285.] It is, therefore, clear that a *secondary meaning* has at-

*tached to plaintiff's hardware, and that the appearance of this hardware is now accepted by the trade as indicating plaintiff.*

In the case of *Rymer v. Anchor Stove Co.*, 70 F. 2d 386 (C. C. A. 6), the defendant had copied the trade dress of plaintiff's heater and had sold those heaters to Montgomery Ward *who, like the defendant Vimcar, manufactured nothing* and was merely a selling organization. The heaters sold to Montgomery Ward bore no identifying marks to denote that they were manufactured by the defendants. The defendants' explanation was that their mark was omitted merely in compliance with Montgomery Ward's requirements and in pursuance of Ward's universal sales policy.

The Court in holding the defendants guilty of unfair competition said:

*"But this will not permit the defendants to escape liability—having assumed the plaintiff's trade dress deliberately, and therefore without doubt intending to profit by the plaintiff's good will, and having in respect to the heaters sold to Montgomery Ward dispensed with the distinguishing marks by which both confusion and liability therefor could be avoided, it put within the power of its customer an opportunity for invading the plaintiff's property right, and the maker has been generally held to responsibility for contributing to the unfair competition which in such cases results. Warner and Co. v. Lilly and Co., 265 U. S. 526."* (Emphasis added.)

It is clear from the evidence in this case that Vimcar induced Halopoff to supply Vimcar with the means to

mislead its buyers into purchasing hardware of Halopoff's manufacture as hardware of plaintiff's manufacture. Where the producer and dealer conspire to create this condition, *they are both guilty of consummating a fraud.* (*Federal Trade Commission v. Winsted Co.*, 258 U. S. 483, 494; *Warner and Co. v. Lilly and Co.*, 265 U. S. 526.)

See also the case of *Rushmore v. Manhattan Screw Co.* (C. C. A. 2), 163 Fed. 929, where on the authority of *Enterprise v. Landers*, and *Yale & Towne v. Alder*, the Court of Appeals affirmed an injunction against unfairly competing by copying plaintiff's *automobile head lamps, even though* defendant placed its own trademark on the lamps.

And the case of *McGill Mfg. Co. v. Leviton Mfg. Co.*, 43 F. 2d 607, 608, where in a case for *patent infringement and unfair competition*, based on the manufacture and sale of *electric switches for lighting fixtures*, the Court granted plaintiff an injunction because defendant had copied *non-functional* features of plaintiff's products.

The defendants should not now be heard to cry that plaintiff has no property rights in the trade dress or appearance of his hardware, for with a practically unlimited field of shapes and sizes to select from, and with a relatively wide choice of mechanisms available affording door adjustment, the fact that defendants chose to *copy the exact construction of plaintiff's hardware* is clear evidence that defendants wanted to capitalize on the good will of plaintiff and the high esteem held by the trade for



his hardware, as well as to get the benefits of plaintiff's superior construction.

“\* \* \*, *with the intent to simulate the plaintiff's blower and divert plaintiff's business in blowers to itself*, the defendant began prior to the commencement of this action \* \* \* of blowers *substantially identical in size, shape, ornamentation, and general appearance* to the blowers made and sold by the plaintiff and possessing the characteristics of the *non-functional features* of the plaintiff's blower, including the same external olive green color.

“These acts on the part of the defendant constitute unfair practices in commerce and trade. *The identity or deceptive resemblance* in appearance of the blowers manufactured by the defendant has had the effect of deceiving the public and diverting sales from the plaintiff of its blowers to the defendant, \* \* \*.” (Emphasis added.)

*Ilg Electric Ventilating Co. v. Every-Use Products, Inc.*, 21 Fed. Supp. 845.

The intent to deceive may be presumed from the natural results of the defendants' acts and it is not necessary to prove it by direct evidence. Deception, like a conspiracy, may be inferred from the circumstances and it will be presumed “where the resemblance is patent and the probability of confusion obvious.” (*Socony-Vacuum Oil Co., Inc. v. Rosen*, 108 F. 2d 632, 44 U. S. P. Q. 379.)

In the *Socony-Vacuum* case, the plaintiff had for some time marketed a stick of lubricant which she first placed on the market under a trade name of her choice. Subsequently, plaintiff supplied these sticks to several large

companies for re-sale. The defendant for a time purchased the stick from plaintiff and re-sold in a special package bearing a composite trademark. Defendant then discontinued the purchase of plaintiff's product and commenced manufacture of a substantially identical lubricant stick of the same *dimensions, form, and general appearance as plaintiff's product*. The defendant there, like the defendants Carter and Vimcar here, *did not give notice of the change* to its distributing organization. The Court, affirming the decree of the District Court holding defendant guilty of unfair competition, stated:

“Since the essence of unfair competition consists in palming off, either directly or indirectly, one person's goods as those of another, *the question of intent to deceive is involved though it is not necessary to prove it by direct evidence*. It may be presumed where the resemblance is patent and the probability of confusion is obvious. \* \* \*

“If the simulation of the competitor in the dress of his goods is sufficient to deceive the average purchaser, unfair competition exists even though there are such differences in imitation as would preclude a claim of infringement of a trademark.”

As ruled by the Court in *Radio Shack Corp. v. Radio Shack, Inc.* (C. C. A. 7), 180 F. 2d 200, 84 U. S. P. Q. 410,

“In all cases of unfair competition, principles of old-fashioned honesty are controlling.”

No amount of legal sophistry can explain away defendants' actions which clearly and incontrovertibly constitute unfair competition.

### Conclusion.

The patent in suit is admittedly a narrow patent in a crowded art. However, the Patent Office is continuing to grant, and rightly we think, patents to workers in the art for modest improvements which are not in the least earth-shaking in character.

It is such a patent that we have here. The evidence shows that as recently as 1949 the industry was still searching for a really efficient and foolproof means of adjusting the vertical position of overhead doors mounted with jamb-type hardware. Various methods had been tried but it remained for plaintiff to take the last step that spelled complete success.

In retrospect, this last step looks quite simple. In fact it was quite simple. But nevertheless, it had up to then eluded all of the skilled workers in the art.

The Patent Office recognizing the merit and novelty of plaintiff's advance in the art, granted him a patent with three narrow claims specifically restricted to his precise contribution.

The correctness of this action by the Patent Office is now challenged by the defendants who also recognized the merit and novelty of plaintiff's hardware. No one should know these facts any better than defendants who had experience as distributors for both plaintiff and his chief competitor Tavart. On the basis of that experience, the defendants deliberately, knowingly and willingly set out to, and did, infringe plaintiff's patent.

To make matters worse, the defendants copied not only the substance but the form and appearance of plaintiff's products and started selling them in the same channels

of trade which they had previously supplied with plaintiff's products. This is unfair competition.

We have shown that none of the so-called prior art brought into Court by defendants discloses or teaches the combination recited and covered by plaintiff's claims in suit. We have shown that these claims include as specific elements thereof plaintiff's extendible cantilever arm and its fixed pivots. And we have shown that defendants, having available to them various kinds of non-extendible cantilever arms and shiftable pivot connections, nevertheless chose to copy plaintiff's structure, having none of these features.

The equities are clear, and the defendants have not met the heavy burden of proof that must be sustained by anyone, especially a deliberate copier, who seeks to invalidate the actions of the Patent Office.

The judgment below should be reversed, and the case remanded to the Trial Court to receive evidence on the question of damages, with an instruction to the Trial Court to treble the same.

Respectfully submitted,

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No. 13490

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROSCOE FOWLER,

*Appellant,*

*vs.*

VIMCAR SALES COMPANY, VICTOR M. CARTER and MORRIS  
J. HALOPOFF,

*Appellees.*

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## APPELLEES' BRIEF.

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## APPELLEES' BRIEF.

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The case involves overhead garage door hardware of a type generally referred to as jamb type wherein Fowler Patent No. 2,516,196 for Adjustable Jamb Type Hardware was adjudged invalid and the defendants held not to have engaged in unfair competition. The decision was rendered by District Judge Harry C. Westover upon the complaint of Roscoe Fowler against Vimcar Sales Company, Victor M. Carter and Morris J. Halopoff, defendants. The complaint appears R. 3-8 and the answer R. 8-15.

## Jurisdiction.

This suit arises under the patent laws. Jurisdiction of the District Court is founded upon Title 28, United States Code, Section 1338. Appellate jurisdiction of this court is based upon Title 28, United States Code, Section 1291. Judgment was entered by the District Court on May 6, 1952 [R. 34]. Appeal from that judgment was taken June 5, 1952 [R. 36].

## Appellees' Statement of the Case.

Appellee, Vimcar Sales Company, is in the general merchandising business. It sells a great variety of hardware products all manufactured by others but the sale is made as the sale of defendants' goods and under defendants' trade-mark. Rarely is the manufacturer's name coupled with the goods. Vimcar sold the adjustable jamb type hardware here in issue as its own goods under its own trade-mark "Olympic" [R. 27, 290]. Vimcar paid for all advertising and promotion.

Vimcar was engaged in the sale of overhead garage doors and garage door hardware for many years. Initially it sold track type hardware. Subsequently it sold Tavart adjustable jamb type hardware [R. 89]. Certain advertising aids were employed. Then Vimcar changed its source of supply from Tavart to Plaintiff Fowler. Vimcar changed from Tavart to plaintiff's hardware because its distribution policy conflicted with that of Tavart [R. 96]. It sold adjustable jamb type hardware

manufactured by Fowler under Vimcar's own trade-mark through the same channels and to the same people to which it sold Tavart adjustable jamb type hardware.

Defendant Halopoff was engaged in the manufacture of standard jamb type garage door hardware long before any acquaintance with Vimcar under the name Hally Stamping Co. [R. 85]. Almost everybody in the garage door hardware business manufactured standard jamb type hardware. It is still made in tremendous quantities and by many of the same persons who manufacture adjustable jamb type hardware.

When Halopoff endeavored to manufacture adjustable jamb type hardware for Vimcar, he used the best features of three different sets, namely, Tavart, Standard and Sturdee [R. 69]. At the time Halopoff used the Olympic hardware model he did not know who manufactured it [R. 71]. Halopoff used the same approach in working up a set of hardware as did Fowler when he used the Tavart as a pattern [R. 157].

Halopoff made changes and improvements over the plaintiff's hardware [R. 75, 81-83].

When Halopoff made the accused hardware he used about ninety per cent of the tools and dies he had previously owned and used in the manufacture of standard hardware [R. 85]. The new hardware manufactured by Halopoff was sufficiently different that plaintiff's witness Walizer knew immediately that the hardware sold by Vimcar of the Halopoff manufacture was not the hard-

ware sold by Vimcar of Sturdee manufacture [R. 285-286].

During all of this period *there was no patent issued to Plaintiff Fowler covering adjustable jamb type hardware. The patent issued many months later on July 25, 1950.* Vimcar had been merchandising that hardware for about one year prior to issue of the patent, having begun in July, 1949 [R. 44]. Adjustable jamb type garage door hardware had been used widely on the market many years prior to this period and the prospect of patent coverage was remote.

Pivot type adjustable garage door hardware was known and used for an equally long period. Pivot type hardware had to be adjustable to make the door plumb in the same fashion as jamb type hardware had to be made adjustable. In 1946, about three and one-half years before the filing date of the patent in suit, Plaintiff Fowler with the help of Earl F. Murphy filed a patent application for jamb type garage door hardware with extensible arms and sold to the public at that time adjustable jamb type garage door hardware.

There is nothing ornamental or decorative about the hardware in question. Every element is purely functional and utilitarian.

## PRELIMINARY LEGAL CONSIDERATIONS.

**Whether Plaintiff's Claims Were Invalid for Lack of Novelty and for Want of Invention Presented a Question of Fact to the Trial Court.**

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Federal Rules of Civil Procedure, Rule 52(a),  
28 U. S. C. A.

This circuit is fully cognizant of the rule.

*Faulkner v. Gibbs*, 170 F. 2d 34, 37 (C. A. 9);

*Refrigeration Engineering, Inc. v. York Corp.*,  
168 F. 2d 896 (C. A. 9);

*Maulsby v. Conzevoy*, 161 F. 2d 165 (C. A. 9);

*Sapp v. Gardner*, 143 F. 2d 423 (C. A. 9);

*Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co.*,  
151 F. 2d 91 (C. A. 9).

Finding of equivalents is a determination of fact.

*Graver Tank and Mfg. Co., Inc. v. Linde Air  
Products Co.*, 339 U. S. 605, 94 L. Ed. 1097.

Whether improvement involves mechanical skill or invention is a question of fact.

*Trico Products Corp. v. Delman Corp.*, 180 F. 2d  
529 (C. A. 8);

*Standard Oil Development Co. v. Marzall*, 181 F.  
2d 280 (U. S. C. A. D. C.);

*Associated Plastics Co. v. Gits Molding Corp.*, 182  
F. 2d 1000 (C. A. 7).

## OUTLINE OF ARGUMENT.

### Part I—The Patent Case.

- A. PATENT NO. 2,523,207, ISSUED SEPTEMBER 19, 1950, JOINTLY TO FOWLER AND MURPHY IS A COMPLETE ANTICIPATION.

Claim 1—Fowler Patent No. 2,516,196.

Authorities are applicable to show anticipation of sole patent by joint patent.

- B. VIMCAR SOLD ADJUSTABLE JAMB TYPE HARDWARE LONG PRIOR TO ITS PURCHASES FROM PLAINTIFF AND SUBSEQUENTLY EXACTLY LIKE THE ACCUSED STRUCTURE A YEAR BEFORE PLAINTIFF'S PATENT ISSUED.
- C. ADJUSTABLE JAMB TYPE HARDWARE AS CLAIMED WAS COMMONLY KNOWN AND OPENLY SOLD LONG BEFORE FOWLER'S ALLEGED INVENTION.

Plaintiff has disclosed what structure anticipates.

Plate A.

Authorities support invalidity because of prior invention.

- D. NO INVENTION LIES IN SHIFTING THE ADJUSTMENT OF THE JAMB TYPE HARDWARE FROM ONE POINT ON THE ARM TO ANOTHER.

Use by Coffey Overhead Doors, Inc.

Authorities are in accord with defendants' position that there is no invention.

Authorities require combination claims to show high degree of invention.

The doctrine of equivalents can be applied to the facts herein.

Plate B.

- E. ADJUSTABLE JAMB TYPE HARDWARE AS CLAIMED BY THE PATENT IN ISSUE WAS IN PUBLIC USE MORE THAN ONE YEAR PRIOR TO FOWLER'S FILING.

Authorities support invalidity on prior public use and publication.

- F. ATTEMPTED CONCEALMENT BY PLAINTIFF OF AN IMPORTANT DRAWING [EXHIBIT P] SHOWS PLAINTIFF NOT STRAIGHTFORWARD IN PRESENTATION OF HIS CASE.
- G. EXISTENCE OF PRIOR ART NOT CITED BY EXAMINER AND MORE NEARLY LIKE DISCLOSURE THAN REFERENCES REBUTS THE PRESUMPTION OF VALIDITY.

Authorities support rebuttal of presumption of validity.

## Part II—The Unfair Competition Case.

- A. DEFENDANTS HAVE NOT BEEN GUILTY OF UNFAIR COMPETITION.

Pertinent facts in the record.

- B. NOT ONLY IS THERE NO EVIDENCE IN THE RECORD TO SUPPORT THE CHARGE OF CONSPIRACY BUT DEFENDANTS COULD NOT ILLEGALLY CONSPIRE TO INFRINGE OR RENDER VALUELESS AN INVALID PATENT OR A NON-EXISTENT PATENT, NOR COULD SUCH AN ALLEGED CONSPIRACY SUPPORT AN ACTION IN UNFAIR COMPETITION.

Principles and supporting authorities.

- C. THERE HAS BEEN NO PALMING OFF ON THE PUBLIC OF DEFENDANTS' HARDWARE AS THAT OF THE PLAINTIFF, AND THE PUBLIC HAS NOT BEEN MISLED AS TO THE ORIGIN OF DEFENDANTS' HARDWARE.

There is no secondary meaning.

- D. THE USE BY VIMCAR OF INSTRUCTION SHEETS STUFFED IN EACH CARTON CONTAINING THE GARAGE DOOR HARDWARE AND WHICH WERE PRINTED AND PAID FOR AT ITS OWN COST, AND THE USE BY VIMCAR OF PHOTOGRAPHS OF GARAGE DOOR HARDWARE IN ITS CATALOGUES, DID NOT CONSTITUTE UNFAIR COMPETITION.

CONCLUSION.

## PART I—THE PATENT CASE.

### A. Patent No. 2,523,207, Issued September 19, 1950, to Joint Inventors Fowler and Murphy, Is a Complete Anticipation.

Patent in issue is completely anticipated by Patent No. 2,523,207, issued September 19, 1950, to joint inventors Fowler and Murphy.

Patent No. 2,523,207, Defendants' Exhibit O, was filed January 14, 1946, and issued September 19, 1950. It was filed three years and ten months prior to the filing date of the patent in suit. It has a jamb plate 11 like that of the patent in suit. It also has a power arm 12 and a cantilever arm 14 divided at the middle. Both the power arm and the cantilever arm are pivotally secured to the door at separate pivot points. It has a spring for a counter-balance.

The patent in issue, Patent No. 2,516,196, is the sole invention of Roscoe Fowler. The patent 2,523,207, Exhibit O, is a joint invention of Roscoe Fowler and Earl F. Murphy. As such the invention of Exhibit O is by a different inventor than whatever might be the invention of the patent in suit. Earl F. Murphy, the joint inventor of Exhibit O, is entitled to every novel conception in that patent as of a date at least as early as its filing date on January 14, 1946.

The earlier patent, Exhibit O, page 1, column 1, lines 31 through 36 [R. 527], states that its object is to render lever arms extensible and contractable to fit doors to



closures. Page 2, column 3, lines 34 through 37 [R. 528], states how the levers are constructed. Exhibit O, page 2, column 3, lines 19 through 33, describe how the lever arms are telescopingly arranged for adjustment [R. 528].

The claims of the patent in issue read directly on Exhibit O. Claim 1 is typical and is applied as follows, employing for consistency plaintiff's analysis of Claim 1, Exhibit 4 [R. 357]. The reference numerals used are taken from Exhibit O [R. 425].

**Claim 1—Fowler Patent No. 2,516,196.**

A mechanism of the type described for pivotally supporting an overhead door on a door frame, comprising:

- (a) *a bracket ((11))* for mounting to the door frame;
- (b) *a master arm ((12))* pivotally mounted intermediate the ends thereof to said bracket;
- (c) *means for pivotally connecting* one end of said arm ((12)) to the door adjacent one edge thereof, said master arm being movable to position an intermediate portion of the door within the door frame;
- (d) *a link ((14, 15)) of adjustable length;*
- (e) *a pivot pin* pivotally connecting a first end of said link to said bracket at a point *fixedly spaced* from the pivotal mounting of said arm to said bracket;
- (f) *means for pivotally connecting* the second end of said link to the normally inner side of the door at a point downwardly spaced from the pivotal

connection between said arm and door ((the bracket 16)), said link controlling the angular position of said door as it moves with and relative to said arm between open and closed positions;

- (g) *means ((slots 15c and bolts therein)) for adjusting the length of said link ((15)) while the aforesaid intermediate portion of the door is within the door frame to thereby cause the door to lie in a vertical plane within the door frame;*
- (h) *and means including a tension spring ((18)) for interconnecting the free end of said arm and the lower portion of the door frame for applying an upwardly directed force to the door.*

The minor variations in Claims 2 and 3 are not of patentable significance in the absence of patentability of Claim 1.

No attempt was made by Fowler to swear back of the filing date of the joint patent. Fowler's date of invention is not earlier than March, 1949 [R. 158].

**Authorities Are Applicable to Show Anticipation of Sole Patent by Joint Patent.**

*The law is well established that the inventor of an earlier filed but later issued application is the first inventor and further that a joint application is one by a person different from a sole application even though the sole applicant may be one of the joint applicants.*

“In view of the fact that the appellant has made no attempt to carry the date of Keidel's invention back of the filing date of Klein and Kasanof, it is

obvious that as between Klein and Kasanof and Keidel the former must be held to be the first inventors.

“It is fundamental that the patentee must be the first inventor. *Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 390, 402, 46 S. Ct. 324, 325, 70 L. Ed. 651.”

*International Seal & Knot Protector Co. v. E. J. Brooks Co.*, 98 F. 2d 647, 648.

In a case involving similar circumstances, Dwight and Lloyd jointly were the first to apply on March 22, 1906, for a certain patent. Later Dwight alone applied on December 23, 1907, from which certain divisional patents were eventually issued. The joint application was co-pending with the sole application until the joint application issued as a patent. In holding the sole patent invalid the court said:

“Dwight & Lloyd jointly were different inventors from Dwight alone, and the joint invention of both is a good anticipation to the later invention of either.”

*Dwight & Lloyd Sintering Co. v. Greenawalt*, 27 F. 2d 823, 830 (C. C. A. 2).

Similar circumstances resulted in a similar holding in a later case wherein a patent of joint patentees Costigan and Denaro was co-pending with a later-applied-for sole application of Denaro. The court in this case said:

“It seems equally clear that the co-pending joint invention of Costigan and Denaro may be properly cited against the patent in suit. Obviously the subject-matter of the prior joint invention was known to the later single applicant, and he cannot claim to be the first inventor of what it contains. Nor is he

entitled to be treated as if he were the sole inventor of the joint patent' \* \* \*." (Citing *Dwight & Lloyd Sintering Co. v. Greenawalt*, 27 F. 2d 823 (C. C. A.).)

*Denaro v. Maryland Baking Co.*, 40 F. 2d 513, 516 (C. C. A. 4).

The converse is true also, namely, that the invention of a prior sole inventor can be used to anticipate a later application by that same sole inventor jointly with another based upon the same subject matter.

"Reed alone being the original and first inventor of the invention disclosed by his application Serial No. 30,022, supplanted later by his application of November 6, 1939, the disclosure by Reed and Ryan jointly, in their application for the patent in suit, cannot be held to be a patentable invention if the earlier invention by Reed alone was such an encroachment upon the field that what is left was too little by way of creative advance to support a patent."

*Kendall Co. v. Tetley Tea Co.*, 189 F. 2d 558, 563 (C. C. A. 1).

It is felt that inasmuch as this phase of the validity issue is so important, the discussion should not be concluded without reference to the recently decided Seventh Circuit case wherein the court discussed co-pending applications as bearing upon the question of who might be the original and first inventor, saying:

"But it is not necessary for us here to determine whether the co-pending applications of the patents hereinbefore described should be considered as prior art in the technical sense, for it is a widely recog-

nized rule that even though such co-pending application which ripens into a patent may not be a part of the prior art in its usual sense, the application for such patent can nevertheless be used to prove that the patentee of the patent in suit was not the original and first inventor or discoverer of any material or substantial part of the thing patented.”

*Permo, Inc. v. Hudson-Rose, Inc.*, 179 F. 2d 386, 389.

**B. Vimcar Sold Adjustable Jamb Type Hardware Long Prior to Its Purchases From Plaintiff and Subsequently Exactly Like the Accused Structure a Year Before Plaintiff's Patent Issues.**

Vimcar sold the Tavart adjustable jamb type garage door hardware in 1947. Vimcar Catalog No. 14, Exhibit Y, page 28 [R. 567] shows a full-page illustration of the Tavart hardware and manner of installation. This hardware looks just like plaintiff's hardware. The cantilever arm is adjustable at the gusset plate to plumb the door. The Catalog No. 14 was published November, 1947 [R. 230].

Adjustable jamb type hardware of plaintiff's manufacture was substituted for the Tavart hardware July, 1949 [R. 44]. Patent No. 2,516,196 here in suit issued July 25, 1950. The only difference in hardware made for Vimcar by Fowler and that made for Vimcar by Tavart was that the adjustment of the cantilever arm was shifted from one end to the middle. Otherwise the hardware is the same.

**C. Adjustable Jamb Type Hardware as Claimed Was Commonly Known and Openly Sold Long Before Fowler's Alleged Invention.**

The earliest claimed date of invention by Fowler as patentee was March, 1949 [R. 158]. Hence, invention any time prior to March, 1949, anticipates.

**Plaintiff Has Disclosed What Structure Anticipates.**

Plaintiff has gone on record in two separate instances to point out just what type of structure would anticipate. Plaintiff notified the witness Winchel of infringement of the patent in suit by items manufactured by Winchel on or about November, 1950, one year prior to the trial of the case [R. 116]. At that time Winchel was manufacturing adjustable jamb type hardware exemplified by Exhibit J [R. 110-111; 420-422]. He was also making the devices of Exhibit L [R. 423; 119-120].

Both Exhibit J and Exhibit L show the cantilever arm adjusted by shifting the pivot point at the location where the cantilever arm is joined to the angle iron at the door. Therefore, according to plaintiff's view, any structure showing the adjustment at this location if prior to the patent is an anticipation.

"It admits of little or no question that if this Brown patent was one of later date than the Wright patent of 1881, it would be held to be an infringement thereof, and, under the authorities, 'that which infringes if later, anticipates if earlier.' *Peters v. Active Mfg. Co.*, 129 U. S. 530."

*Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 203, 38 L. Ed. 121, 129 (Syllabus 10).

See also:

*Midland Flour Milling Co. v. Bobbitt*, 70 F. 2d 416, 418 (C. A. 8).

The file history teaches what should be considered anticipating.

This statement appears in the file history:

“For example, the length of the member 16 might be made adjustable, in which case the advantages of the invention could be obtained *without adjustment of the link 14.*” (Emphasis added.) [Ex. G, p. 40; R. 469.]

Obviously, therefore, plaintiff considers the invention to include adjustment of the location of the pivot point and not only adjustment of the length of the cantilever arm. Hence, any device showing adjustment of the pivot point will, in plaintiff's view, anticipate the invention if earlier than March, 1949.

#### Plate A.

To facilitate comparison of prior devices with the present structure defendant has prepared Plate A in the appendix of this brief. Plate A, reading from left to right, shows first in Figure 1 standard jamb type hardware manufactured and sold extensively in 1941 and before. Figure 2 shows hardware of adjustable jamb type manufactured by various persons including Murphy and the witnesses Winchel and McFadden in 1947 and 1948. Figure 3 shows adjustable jamb type hardware advertised and sold by Coffey Overhead Doors, Inc., in 1947. Adjustment of the cantilever arm was at either end. Figure 5 shows the early Tavart adjustable jamb type hardware sold in about 1945. Here the adjustment was at the pivot point between the gusset plate and the cantilever arm.

Figure 6 is Figure 1 of the patent in issue showing the same adjustable jamb type hardware as was previously in use but with adjustment of the cantilever arm in the middle.

The sole purpose in providing an adjustment is to plumb the door in the doorway; that is to say, to make the door fit the doorway for which it was made. The adjustment in every instance is accomplished by moving the bottom of the door out or in a little bit so that it will be straight up and down when closed. This adjustment is accomplished by changing the relative position of points A and B. It makes no difference so far as the ultimate result is concerned whether the cantilever is adjusted at the outside end, the inside end, or at the middle.

In Figure 2 the adjustment is at the outer end labelled A. In Figure 3 the adjustment may be at either A or B. In Figure 4 the adjustment is at the point B. In Figure 5 the adjustment is at the point C. Here two slots and two bolts are used on each arm for the adjustment instead of a single bolt at either end. Portions of the cantilever overlap.

While the analogy may seem absurd, if plaintiff claims to be the inventor of anything, it must be that he is either the inventor of using two slots instead of one to adjust the cantilever arm or perhaps is the inventor of making the cantilever arm stiffer in the middle. Those are the only significant differences between the patent and the proven prior art.



### Authorities Support Invalidity Because of Prior Invention.

The alleged invention of the Fowler patent is in an extremely crowded field. As to this plaintiff agrees (Pltf. Br. p. 57). The trial court heard expert testimony on both sides concerning prior art and the interpretation of claims of the patent based on this conflict the trial court resolved for defendants. The most pertinent prior art comprises a series of publications and devices sold by competitors rather than the patents cited as defense material.

In treating with the subject of combination patents like that here in issue, the Supreme Court in a case long recognized as authority on this point said:

“The patent is therefore void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in combination with other old parts which perform no new function in the combination.”

*Lincoln Engineering Co. v. Stewart-Warner Corp.*,  
303 U. S. 545, 549, 82 L. Ed. 1008, 1010.

In still another case it was held that in an apparatus involving the centerless grinding of screw threads and a screw feed therefor the claims were invalid. The Court in that case stated:

“. . . an inventor's contribution must be measured against the whole prior art, whether he knew

of it or not; and it follows that his originality is not to be judged subjectively, but by what attainments were required of a putative inventor who was aware of all that had been done in the past.”

*Landis Machine Co. v. Parker-Kalon Corp.*, 190 F. 2d 543, 546, 90 U. S. P. Q. 129, 132 (C. C. A. 2).

Where a prior disclosure was in the form of a publication, it is a bar. The Supreme Court further said:

“ . . . one really must be the first inventor in order to be entitled to a patent.” (Emphasis ours.)

*Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 390, 70 L. Ed. 651, 653.

That the Ninth Circuit is in accord with the authorities is clear from the Court of Appeals decision upholding the judgment of Judge McCormick where he held certain claims invalid, the Court of Appeals stating as follows:

“Even if the disclosures of the prior art had fallen short of complete anticipation, yet invention may be negated by such disclosures. *Triumph Explosives v. Kilgore Mfg. Co.*, 128 F. 2d 444, 447 (52 U. S. P. Q. 199, 202-203), certiorari denied, *Faber v. Triumph Explosives*, 317 U. S. 660 (55 U. S. P. Q. 493).”

\* \* \* \* \*

“When a rotatable rocker was substituted for the rising arms or bars in the Schaefer, as Marschalk had done, it should be apparent to any mechanic skilled in such matters that the only practical means of securing equilibrium in the pressures upon the rocker was by making the point where the pressure

was applied to the tappet coaxial with the rocker, which was but the application of an ancient principle of coaxiality to the problem of obtaining balance.”

*Leishman v. General Motors Corp.*, 91 U. S. P. Q. 190 (C. A. 9, decided Aug. 13, 1951).

See also:

*Keuffel & Esser Co. v. Pickett*, 182 F. 2d 581 (C. A. 7).

**D. No Invention Lies in Shifting the Adjustment of the Jamb Type Hardware From One Point on the Arm to Another.**

**Use by Coffey Overhead Doors, Inc.**

Reference is made to Defendants' Document No. 4 [R. 406] admitted by plaintiff to be a publication of the Western States A-E-C Catalog File 1947-1948 Edition. The document in question circulated long prior to plaintiff's claimed date of invention shows two types of overhead hardware sold extensively by Coffey Overhead Doors, Inc., of Los Angeles. On the left side of the document is illustrated the familiar pivot type hardware. On the right side is illustrated equally familiar adjustable jamb type hardware. The pivot type hardware can be adjusted to plumb the door in place by extending either the upper arm or lower arm to change its length. Either adjustment will tilt the door to make it perpendicular [R. 195].

On the right-hand side of the page the adjustment for the jamb type hardware is explained by a legend captioned "Easy Jamb Model." As directed the door can be adjusted in the opening "by moving the long arm up or down." The door is adjusted when in a down position [R. 191]. It is the relative position of the two pivot

points which needs changing to adjust the door [R. 190-191]. Coffey elected to use a cantilever comprising a single piece and to make the adjustment at one pivot point or the other to set the door perpendicular.

Here on the same document on the opposite side of the page is the suggestion that an arm can be made in two pieces adjustable to change its length for precisely the same reason. Of course, making the arm in two pieces would require more metal, more nuts and bolts, and more manufacturing operations, obviously costing more money. Clearly, there is no invention in taking the extensible arm from the adjustable overhead hardware on one side of the page and using it in the adjustable overhead hardware on the other side of the page, instead of making the adjustment at the end. This hardly meets the standard of invention now recognized by the leading authorities.

The prior art is replete with examples of extensible arms on overhead garage door hardware for adjusting purposes as, for example, Wolf Patent No. 2,166,898, Figure 2 [R. 504]; Holmes Patent No. 2,228,314, Figure 1 [R. 522]; Peck Patent No. 2,233,638 [R. 527]; and many others. The adjustment is a most obvious mechanical expedient.

The witness Colter who has hung upwards of ten thousand overhead garage doors prefers the pivot type hardware to jamb hardware [R. 227]. Colter has no preference of one type of jamb hardware over another [R. 212]. Plaintiff did no more than make the same device as the prior art but in a more cumbersome and expensive form.

**Authorities Are in Accord With Defendants' Position That  
There Is No Invention.**

Absent some new or unexpected result dividing into two or more parts that which previously was made in one part is not patentable.

*In re Beers*, 44 F. 2d 859 (C. C. P. A.);

*Laclede-Christy Clay Products Co. v. City of St. Louis*, 280 Fed. 83, 85 (C. A. 8);

*Benedeck v. Coe*, 33 Fed. Supp. 306, 308 (D. C. U. S. Dist. Col.);

*Standard Stoker Co. v. Berkley Mach. Works & Foundry Co.*, 29 Fed. Supp. 349, 368 (D. C. E. D. Va.).

Plaintiff here has admitted the patent to be a combination patent in a crowded art (Pltf. Br. p. 57). Plaintiff's claims are admittedly very detailed and limited (Pltf. Br. p. 13).

**Authorities Require Combination Claims to Show High  
Degree of Invention.**

The Supreme Court has recently reiterated the law with regard to claims usually described as claims for a combination where the measure of difference is very limited. The court in this case said:

"The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable.

"Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements

with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men.”

*Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 117, 71 S. Ct. 127, 87 U. S. P. Q. 303, 305, 306.

That this Ninth Circuit Court of Appeals is fully cognizant of the measure of invention is evidenced by its recent decision in the case of *Kwikset Locks, Inc., et al. v. Carl A. Hillgren*, No. 13060, decided March 16, 1953, wherein a holding of validity was reversed in a case where elements of a lock structure evidenced substantially greater ingenuity than the very mediocre change accomplished by the plaintiff in this case.

Language used by this court in the *Kwikset* case is applicable here.

In considering the patent a combination patent this Appeal Court elected to review carefully the record of evidence and after so doing reversed the lower court holding the patent invalid.

“It has been said that, in order for the combination to be considered a patentable invention it must ‘perform some new or different function—one that has unusual or surprising consequences.’ *Photochart v. Photo Patrol*, 9 Cir., 1951, 189 F. 2d 625, 627; *Grinnell Washing Machine Co. v. Johnson Co.*, 1918, 247 U. S. 426; *Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 1940, 340 U. S. 147. There is no invention in a ‘mere *aggregation* of a number of old parts or elements,’ nor in the *accumulation* of old devices which do not in some way exceed ‘the sum of its parts.’ (Emphasis ours.) Moreover, a

truly inventive combination must create what had not before existed or bring to light what lay hidden from vision in a way which can be distinguished from 'simple mechanical skill.' ”

Other decisions evidence general accord with the decision of the Supreme Court in the *A. & P.* case. Attention is directed to the following:

*Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, 86 L. Ed. 58, 62, 63;

*Altoona Publix Theatres v. American Tri-Ergon Corp.*, 294 U. S. 477, 486, 79 L. Ed. 1005, 1011, 1012;

*Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545;

*Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 122 F. 2d 492, 497, 499, 501 (C. A. 9);

*Photochart v. Photo Patrol, Inc.*, 189 F. 2d 625, 90 U. S. P. Q. 46, 48;

*Permo, Inc. v. Hudson-Ross, Inc.*, 179 F. 2d 386, 390 (C. A. 7).

**The Doctrine of Equivalents Can Be Applied to the Facts Herein.**

**Plate B.**

In the appendix of this brief defendants have prepared a schematic diagram illustrating the equivalency of the three modes of adjusting jamb type hardware so as to make the door plumb or vertical in the doorway. The position of the door out of plumb has been exaggerated to illustrate the direction of adjustment needed because in actual practice the amount of adjustment would be but a small fraction of an inch which would not show up on the small scale schematic drawing of Plate B.

As there shown Figure 1 shows overhead jamb type garage door hardware with the adjustment at the junction of the cantilever arm with the door. The door is illustrated in broken lines as it would be out of plumb and before adjustment. It is illustrated in solid lines in the position subsequent to adjustment. In Figure 1 to adjust the door pivot point A would be moved down. This assumes the cantilever arm to remain the same length and the pivot point B to remain fixed.

Figure 2 shows the same door and doorway but with the cantilever arm having the movable pivot at the point where the pivot is secured to the building structure by way of a gusset plate. In this instance pivot point B would be moved upwardly assuming the cantilever arm to remain the same length and the pivot point A to remain fixed.

In Figure 3 the same circumstances apply except that pivot points A and B both remain fixed. Therefore it is necessary to change the length of the cantilever arm. In this case the length of the arm is shortened. The amount the cantilever arm is shortened is comparable to the amount of shift of either the point A in Figure 1 or the point B in Figure 2.

All other parts of the door and its hardware and location of the joints remain identical. The adjustment of Figure 3 is the full equivalent of the adjustments of either Figure 1 or Figure 2.

Extensible lever arms for adjusting overhead garage door hardware are found in many patents; for example, Wolf No. 2,166,898 [R. 504], Ferris No. 2,170,295 [R. 508], Holmes No. 2,228,314 [R. 522].



When this is understood, the authorities controlling application of the doctrine of equivalents will be found to fully apply to the present case.

“It is elemental that the mere substitution of equivalents which do substantially the same thing in the same way, even though better results may be produced, is not such an invention as will sustain a patent.”

*Dow Chemical Co. v. Halliburton Co.*, 324 U. S. 320, 89 L. Ed. 973, 64 U. S. P. Q. 412.

On a factual basis similar to the case here was one involving a signal torch consisting of an open flame over which had been placed a cap to keep out the rain.

“They solved it by merely bringing together the torch and cap. As before, the torch continued to produce a luminescent, undulating flame, and the cap continued to let in air for combustion, to protect the flame from wind and rain and to allow it to emerge as a warning signal. They performed no joint function. Each served as separately it had done. The patented device results from mere aggregation of two old devices, and not from invention or discovery.”

*Toledo Pressed Steel Co. v. Standard Parts*, 307 U. S. 350, 355, 356, 83 L. Ed. 1334, 41 U. S. P. Q. 593.

This circuit is in accord with the application of the doctrine of equivalents as set forth by the Supreme Court.

*Schick Service v. Jones*, 173 F. 2d 969, 973, 974 (C. A. 9);

*Magarian v. Detroit Products Co.*, 128 F. 2d 544, 545 (C. A. 9);

*Dailey v. Lipman, Wolfe & Co.*, 88 F. 2d 362, 364 (C. A. 9).

Other circuits are in agreement.

*Logemann Bros. Co. v. Galland Mfg. Co.*, 100 F. 2d 557, 559 (C. A. 7);

*Union Simplex Train Control v. General Ry. Signal Co.*, 91 F. 2d 950, 954 (C. A. 2);

*Ranco, Inc. v. Gwynn*, 128 F. 2d 437, 442, 443 (C. A. 6).

In the case at bar the equivalents are found in precisely the same structures, in precisely the same art, and performing the same function.

**E. Adjustable Jamb Type Hardware as Claimed by the Patent in Issue Was in Public Use More Than One Year Prior to Fowler's Filing.**

Plaintiff engaged in the manufacture and sale of the invention covered by the patent in suit prior to November 14, 1948. It has already been carefully pointed out how Claim 1 of the patent in suit reads upon the structure of the joint Fowler and Murphy patent, Exhibit O (see pp. 8-10 of this brief). Other than some unimportant dimensional differences structure identified as a low clearance type adjustable jamb hardware meeting the claims of the patent in suit was made and sold to the public.

McFadden, appearing under subpoena served on behalf of defendants, worked for plaintiff in 1946 for three months for the express purpose of improving the low clearance jamb hardware then manufactured by plaintiff. Earl Murphy, the joint patentee of Exhibit O, was also working for plaintiff at the same time. At that time McFadden saw hardware like Exhibit O and made changes in it [R. 133-134]. It had an adjustment in the middle

of the cantilever arm. It was on the market [R. 135].  
McFadden was *sure* it was on the market.

“The Court: I want to refer you to Exhibit O and call your attention to the fact that the bars No. 15 and No. 12 seem to be in two pieces, bolted in the middle.

The Witness: This is bolted in the middle.

The Court: That is, 15 was bolted in the middle.

The Witness: Yes, and there was two sets of holes there, one adjustment for a 7-foot door and one for an 8-foot door, but that was all.

The Court: How about 12?

The Witness: This one had two holes in it, one for the 7 and one for the 8.

The Court: When you went to work for Mr. Fowler, was the structure in that kind of condition, that is, two bars here and two pieces, or is that something that developed while you worked there?

The Witness: That is something that was there.

The Court: Already there?

The Witness: To make the adjustment for the 7 and 8 foot doors.

The Court: Do you know whether or not that structure was ever made and sold?

The Witness: Yes, it was made and sold.

The Court: You are sure of that, are you?

The Witness: Yes, sir.

The Court: On the market?

The Witness: Yes, sir.

The Court: It was not for experimental purposes only?

The Witness: This set was made and sold.

The Court: In 1947?

The Witness: Yes, sir.

The Court: All right” [R. 138-139].

McFadden repeats again [R. 143] that there was an adjustment in the cantilever arm to adapt it to seven and eight-foot doors. Though the adjustment may have been in feet instead of inches, as the court remarked [R. 140-141], the principle is the same.

Plaintiff's counsel admits that what was sold in connection with the hardware exemplified by Exhibit O was hardware with a series of holes [R. 144]. Presumably that is how it is distinguished from Exhibit O which shows slots.

McFadden was not a stranger to jamb hardware. That was his business before and after his association with Fowler. He knew a great deal about it. Every word of his direct testimony carries conviction that he saw hardware with an adjustable cantilever arm manufactured and sold by the plaintiff not later than 1947 [R. 135].

Plaintiff in his deposition Exhibit B refused to produce any drawings in connection with his lo-head jamb type hardware. But does it not seem strange that there should be no drawings for this important item in Plaintiff's very limited line of goods?

**Authorities Support Invalidity on Prior Public Use and Publication.**

Prior public use or publication more than one year prior to the filing date of the patent in issue is sufficient to invalidate the patent. (R. S. 4886; 35 U. S. C. 31.) (The statute was changed to one year from two years, effective August 1940.)

Authorities illustrate application of the statute:

“ ‘ . . . although only one clamp and one lamp were ever made, which were used together two and one-half months only, and the invention was then taken from the lamp and was not afterwards used with carbon pencils, it was an anticipation of the patented device, under the established rules upon the subject.’ ”

*Brush v. Condit*, 132 U. S. 39, 33 L. Ed. 251, 255.

Even though the prior public use might not be quite as good or effective as the patent in suit, nevertheless, if the principle is disclosed, there is anticipation.

“The degree of success of this Mansfield tool is not so plain. I am satisfied that the tool made at Mansfield was not anywhere near as successful as the present tool of the plaintiff, but I do not understand that that is the test, measuring its success by the present success and present usefulness.”

*Eclipse Interchangeable Counterbore Co. v. Gairing Tool Co.*, 33 F. 2d 942, 943 (affd. 48 F. 2d 73).

Similarly in a case relating to a rotary drilling rig for deep well drilling it was held:

“Nevertheless, the existence and operation of a machine, abandoned after its completion and sufficient use to demonstrate its practicability, is evidence that the same ideas incorporated in a later development along the same line do not amount to invention.”

*Pennington v. National Supply Co.*, 95 F. 2d 291 (C. A. 5).

Defendants here have proved a great variety of prior public uses and prior publications *any one* of which would be sufficient to invalidate the patent in suit.

“. . . it has been held that a single sale of an article more than two years prior to the application for the patent is all that is required by the statute.”

*Maibohm v. RCA Victor Co.*, 89 F. 2d 317, 321 (C. A. 4).

In the case here in issue Fowler failed to carry the date of his invention back. According to the authorities, he should be limited to his filing date of November 14, 1949. There is, however, some indication of the device having been manufactured shortly before that time. So far as the evidence is concerned, we can assume that Fowler's invention was no earlier than March, 1949, as he vaguely suggests. In that event any public use or publication prior to March, 1949, would anticipate as the law is interpreted:

“Langdon's application did not carry his invention back before that date. In that situation it must be presumed that these trailers which were publicly used or published prior to his application were also prior to his claimed invention.”

*Willamette-Hyster Co. v. Pacific Car & Foundry Co.*, 122 F. 2d 492, 502 (C. C. A. 9).

It was further held in the above cited case that where in effect a publication shows a sufficient portion of an invention to permit one skilled in the art of supply the details, that publication is a good prior publication (p. 497).

The same interpretation of what constitutes the invention which applied to prior invention applies with equal

force to prior public use. This means that since Fowler considers the adjustment at one end or another of the cantilever to come within the scope of the patent, that adjustment if prior to November 14, 1948, is a prior public use. (*Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 200, 203, 38 L. Ed. 121, 129; previously quoted from herein.)

**F. Attempted Concealment by Plaintiff of an Important Drawing [Ex. P] Shows Plaintiff Not Straightforward in Presentation of His Case.**

The defendants in presenting their case compelled the plaintiff to produce at the trial a detailed production drawing [Deft. Ex. P].

During plaintiff's deposition taken by defendants on August 30, 1951 [Ex. B], plaintiff was asked and answered the following questions pertaining to a complete drawing of the hardware in suit. They begin on page 14 of plaintiff's deposition [R. 303].

“Q. When did you go into production on that first? A. About the same time.

Q. And you said January, February or March of 1949? Was that what you said? A. That's right.

Q. Do you have here your production drawings, copies of your production drawings of that date? A. *We never had a production drawing.* (Emphasis added.)

\* \* \* \* \*

Q. Do you have any records that show any drawings from which the die was made? A. No. There wouldn't be any records at all. There may, at that

time, have been sketches of a few certain parts of the die, *but there was no complete drawing ever made.*" (Emphasis added.)

At the trial plaintiff produced as his witness a Mr. Moore who testified that he prepared the drawing after a conference with Mr. Fowler [R. 237]. Mr. Moore also testified that he delivered the vellum (white copy of the drawing) to Mr. Fowler personally [R. 240]. This witness also testified that he billed the plaintiff for this drawing and that it was paid for. Invoices were produced at the time of trial to prove payment.

The drawing, Exhibit P, shows both an assembly and detailed parts completely dimensioned together with a check list of all parts necessary to build the commercial jamb hardware manufactured by plaintiff. *This is in every respect a production drawing from which jamb hardware is manufactured.*

The drawing is dated 9-1-48 and bears No. 491. At the time of trial Defendants' Exhibit P was produced in court by plaintiff's counsel after defendant made a demand therefor in open court. It is interesting to note that the drawing, although material to the issues involved, was never voluntarily produced by the plaintiff as part of his case in chief. A production drawing as complete as this would have been one of the first documents offered in evidence by the plaintiff to establish his invention if he had one. Plaintiff's attempt to prove the date of the drawing to be other than as the drawing is dated was ineffective and failed to convince the trial court.

This witness Moore also testified that he saw the vellum drawing in Mr. Fowler's possession approximately one month before the trial [R. 245]. The alleged error in the date of the drawing was called to Mr. Moore's atten-



tion about one month before trial [R. 247]. In the face of this plaintiff's statement, "That is the mystery drawing; I don't know anything about it" [R. 288], does not ring true. Any item of adjustable jamb type hardware manufactured in accordance with the production-drawing, Exhibit P, as of about the date that drawing was made is a complete public use bar to validity of the patent.

**G. Existence of Prior Art Not Cited by Examiner and More Nearly Like Disclosure Than References Rebutts the Presumption of Validity.**

Though a patent may be presumed to be valid by virtue of its issue, that presumption is rebuttable. The following facts are important to take into consideration inasmuch as they in themselves are sufficient to destroy the presumption of validity of the patent in suit.

As clearly appears from the file history of the patent in suit [Ex. Q; R. 431] and also from the paper copy of patent [Ex. 1; R. 353] only five prior art patents were considered by the Examiner, namely:

|        |           |            |
|--------|-----------|------------|
| Guth   | 2,162,381 | [Ex. U-4]  |
| Wolf   | 2,166,898 | [Ex. U-5]  |
| Ferris | 2,170,295 | [Ex. U-6]  |
| Holmes | 2,259,819 | [Ex. U-12] |
| Wread  | 2,441,742 | [Ex. U-15] |

None of these patents shows jamb hardware in the form employed in 1945 and later by the sundry manufacturers of jamb hardware of which Tavart is an example. The prior art patents to Ferris, Holmes and Wread relied on by the Examiner show overhead hardware wherein the power arm is pivoted at a separate location from the cantilever arm. The Wolf patent shows only pivot hardware. The Guth patent, although showing jamb type hardware,

shows a location for the coil spring on the cantilever arm rather than on a protruding end of the power arm. *No other references were made of record.* Based upon these references the patent in suit was issued.

*What the Examiner did not have before him* was an example of the old "Standard" 1941 jamb hardware like that of Exhibit B-1 (see also Plate A, Figure 1). Not considered also was the lo-head hardware, Exhibit B-5. The adjustable Tavart hardware of Exhibit C-1 and Exhibit D was not before the Examiner (Plate A, Figure 4). The adjustable hardware of Coffey, Exhibit C-4 was not of record in the prosecution of the patent in issue (Plate A, Figure 3). The Winchel adjustable jamb hardware, Exhibit J, and the McFadden adjustable jamb hardware of Exhibit N were not before the Patent Office (Plate A, Figure 2). These prior inventions should have been considered by the Examiner. The fact that they were not and that they bear such a close identity to the patent in suit destroys the presumption of validity.

#### **Authorities Support Rebuttal of Presumption of Validity.**

The presumption of validity is a rebuttable presumption. It is destroyed effectively where prior art is introduced which was not considered by the Patent Office when the application was allowed.

In a Ninth Circuit case wherein the Patent Office considered one Manning Patent No. 1,684,551, holding it not an anticipation but failed to consider another Manning Patent No. 2,029,380 which was much more apt, it was held that this was a point in rebutting the presumption of validity.

*Crowell v. Baker Oil Tools*, 153 F. 2d 972, 976  
(C. A. 9) (Syllabus 8).

Failure to cite pertinent prior art during the prosecution of a patent which was later produced at trial invalidated a patent.

“The issuance of a patent creates no presumption of validity sufficient to overcome a pertinent prior art reference which has not been considered in the patent office.”

*O’Leary v. Liggett Drug Co.*, 150 F. 2d 656, 664 (C. A. 6).

Courts of Appeal are in agreement with this principle as evidence the Second Circuit holding:

“Lear was not cited against the Walsh patent—a fact which weakens the presumption of validity arising from the grant of a patent.”

*Gerald M. Friend v. Walsh*, 141 F. 2d 180, 181 (C. A. 2).

In another case a magazine article which the Examiner failed to consider as prior art but which existed prior to the application resulting in the patent was found sufficient to invalidate the patent, the court on this point saying:

“‘This certainly helps to rebut the presumption of validity of the patent, with which we start, by reason of its having been issued by the Patent Office.’”

*Maibohm v. RCA Victor Co.*, 89 F. 2d 317, 320 (C. C. A. 4).

See also:

*Benjamin Electric Mfg. Co. v. Bright Light Reflector Co.*, 111 F. 2d 880 (C. C. A. 7).

## PART II—THE UNFAIR COMPETITION CASE.

### A. Defendants Have Not Been Guilty of Unfair Competition.

#### Pertinent Facts in the Record.

Apart from the issue of invalidity and non-infringement Defendants have been charged with unfair competition supported by charges of conspiracy. Much of the evidence submitted on behalf of the patent phase of the case has also been sought to be relied upon to support the unfair competition charges. To round out defendants' argument that there is no unfair competition some repetition of and enlargement upon evidentiary references already set forth in Part I of the Brief may be necessary especially where additional factors have some direct influence on the interpretation of facts previously made reference to.

Certain specific incidents are illustrative of plaintiff's failure to prove a case of unfair competition.

While dealing with Tavart, Vimcar manufactured at its own expense a table model illustrating a garage door hung on jamb hardware [Pltf. Ex. 3, and R. 231-232]. These models were later used as advertising aids in the sale of plaintiff's hardware. Every part of this table model was paid for by Vimcar, and its trade name "Olympic" appeared on each model. At the commencement of the trial in this case, counsel for plaintiff in his opening statement claimed this model as the idea and property of plaintiff. No evidence was ever offered to support this contention.

In November, 1947, Vimcar published its trade catalog, No. 14 [R. 230-231] in which there was exhibited and displayed Tavart jamb type hardware. This catalog was published and in circulation among the trade long before Vimcar did any business with the plaintiff. Vimcar did not need plaintiff's photos [R. 291] and such photos as were used by Vimcar were taken at its request and Vimcar applied its own art work to the photos, and some were touched up by an air brush [R. 54-55].

Drawings of jamb type hardware were made by Vimcar in its offices, by its employees, and at its own cost [R. 233]. These drawings were also used as sales aids not only in the sale of hardware purchased from defendant Halopoff, but also plaintiff's hardware. Plaintiff admitted that he never supplied Vimcar with any drawings or specifications of the jamb type hardware [R. 339].

All garage door hardware purchased from plaintiff by Vimcar and sold and distributed by Vimcar was sold under its trade name and mark "Olympic," *with the knowledge and approval of plaintiff* [R. 97]. We quote from the record:

"The Court: If the catalog was published, did it use the name of the plaintiff's structure?"

Mr. Fulwider: No. Vimcar always used its own name. We are not charging any unfair competition by reason of trademark infringement or trade name infringement.

The Court: Do I understand even when you sold your structure to Vimcar, Vimcar resold it under Vimcar's name?

Mr. Fulwider: That's right, your Honor, which they had a perfect right to do, of course.

The Court: They had a right to do it if you let them do it." [R. 49.]

Builders Emporium of Van Nuys, a corporation, the stock in which is controlled by defendant Carter, also sold garage door hardware under its trade name "Zenith" [R. 48-49].

In July, 1949, Vimcar started to purchase garage door hardware from plaintiff for the purpose of resale under the trade name "Olympic" at the same time that plaintiff was selling the same hardware to wholesalers and dealers under plaintiff's own trade name of "Econo-Jamb" [R. 59 and 165].

We are reminded again that *at the time plaintiff initially engaged in business with Vimcar, there was no patent in existence.*

The evidence further shows that Vimcar at its own cost and expense printed instruction sheets and supplied them to plaintiff for him to stuff into the boxes containing the hardware [R. 46-47]. The defendant's name, Vimcar, and its trade name, "Olympic," were plainly printed on each instruction sheet. Plaintiff boxed the hardware for Vimcar and sold the hardware to Vimcar in cartons, with the defendant's trade name "Olympic" on each carton [R. 289].

**B. Not Only Is There No Evidence in the Record to Support the Charge of Conspiracy but Defendants Could Not Illegally Conspire to Infringe or Render Valueless an Invalid Patent or a Non-existent Patent, nor Could Such an Alleged Conspiracy Support an Action in Unfair Competition.**

It has already been stated that at the time defendants started doing business with each other, the patent in suit had not issued to plaintiff. The patent in suit did not issue until six months after the first sale by Halopoff to Vimcar. How, therefore, could defendants have entered into a conspiracy in January or February, 1950, to render valueless a patent which did not issue until six months thereafter? [R. 80.] If there was no patent, anyone had a right to duplicate exactly plaintiff's hardware.

**Principles and Supporting Authorities.**

It is elementary that a conspiracy to be actionable must result in the perpetration of an unlawful or injurious act by unlawful means.

*Sweeley v. Gordon*, 47 Cal. App. 2d 385, 118 P. 2d 16;

*Lynch v. Rheinschild*, 86 Cal. App. 2d 672, 195 P. 2d 448;

*Rose v. Ames*, 53 Cal. App. 2d 583, 128 P. 2d 65.

A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action.

*Wallace v. Kerr*, 42 Cal. App. 2d 182, 108 P. 2d 754;

*Williams v. Spazier*, 134 Cal. App. 340, 25 P. 2d 851.

In order to establish a civil conspiracy, the following three elements must be alleged and proved:

1. Concert of action between the defendants to accomplish the purpose of the conspiracy;

2. That the actions were illegal and in furtherance of common scheme or design to achieve the unlawful purpose of the conspiracy; and

3. Their knowledge of the conspiracy and its unlawful purpose.

*Neblett v. Elliott*, 46 Cal. App. 2d 294, 115 P. 2d 872.

Evidence which merely raises a suspicion of concerted action upon the part of the defendants is insufficient to support a finding that there is a conspiracy.

*Adkins v. Potter*, 211 Cal. 512, 296 Pac. 285.

Plaintiff cannot by means of an unfair competition suit shut out other manufacturers from manufacturing an unpatented item. *Were it otherwise, plaintiff would be given a monopoly more effective than that of the unobtainable patent.* The above statement finds direct support in the case of *Pope Automatic Merchandising Co. v. McCrum-Howell Co.*, 191 Fed. 979, 981 (1911, 7 Cir.), in which the court stated the rule as follows:

“Development in a useful art is ordinarily toward effectiveness of operation and simplicity of form. Carriages, bicycles, automobiles, and many other things, from diversity have approached uniformity through the utilitarian impulse. If one manufacturer should make an advance in effectiveness of operation, or in simplicity of form, or in utility of color, and if that advance did not entitle him to a



monopoly by means of a machine or a process or a product or a design patent, and if by means of unfair trade suits he could shut out other manufacturers who plainly intended to share in the benefits of the unpatented utilities, and in the trade that has been built up thereon, but who used on their products conspicuous nameplates containing unmistakably distinct trade names, trade marks and names and addresses of *makers*, and in relation to whose products no instance of deception has occurred . . . he would be given gratuitously a monopoly more effective than that of the unobtainable patent in the ratio of eternity to 17 years.” (Emphasis added.)

See also in the case of *Marvel v. Pearl*, 133 Fed. 160 (C. C. A. 2, 1904), in which the court held in the absence of protection by patent, no person can appropriate to the exclusion of others elements of mechanical construction which are essential to the successful practical operation of a manufacturer, or which primarily serves to promote its efficiency.

Unfair competition is not established by proof of similarity in form, dimensions or general appearance alone, especially where such similarity is characteristic of the article in question, or appears to result from an effort to comply with the physical requirements essential to its successful operation, and not from any design to misrepresent its origin.

Plaintiff, through his counsel at the time of trial, readily admitted that there was nothing ornamental about the garage door hardware in suit [R. 162]. The hardware in suit is manufactured in its most efficient and economical form into which the mechanical combination can properly be embodied. There is not a

line, a curve, or a bit of superfluous material for embellishment or distinction. There is nothing ornamental about it. The hardware does not contain any non-functional features. It is strictly utilitarian in purpose. *There is no distinct form to any metal parts of the hardware in suit. The smallest amount of metal is used to do the job.*

The charge that Halopoff copied non-functional features of plaintiff's hardware finds no support in the record. There is not an iota of evidence to support this contention. Halopoff testified that he made some changes and improvements to the hardware. These were utilitarian changes and purely functional in character [R. 81, 82]. For example, plaintiff's hardware has a round offset [R. 83] where Halopoff's has a straight one. Halopoff's hardware has two extra holes so that it can be used for light weight aluminum doors. In one set of the hardware the channel has ridges, and in the other it is plain.

Though plaintiff contends that Halopoff copied non-functional features of plaintiff's hardware, we note with interest that plaintiff does not point out what non-functional features Halopoff copied. The fact that Halopoff's hardware may be the same size and shape of plaintiff's in many respects does not prove that this constitutes a copying of non-functional features. Everybody's hardware is substantially the same size.

An inventor cannot prevent others from making, selling or using unpatented inventions. In the case of *M. J. Lewis Products Co. v. Lewis*, 57 F. 2d 886 (D. C. Pa., 1931), the court said:

“Mere fact that competitors were selling meter cabinets substantially like those furnished by plaintiff

held not to warrant injunctive relief on ground of unfair competition. When an article is merely a mechanical device, unfair competition cannot be predicated upon the sale of similar articles.”

Again in the case of *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 16 S. Ct. 1002, the court held that at the expiration of a machine patent, the utilitarian form in which the patentee had embodied his mechanical combination also became public property. No difference in principle is perceived between a machine that after a period of seventeen years becomes free for common use, and one that has been such all the time.

Plaintiff cites the case of *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37 at 28 (C. C. A. 2). This case is clearly distinguishable from the facts in the present case. In the *Yale* case the court found that the Yale lock had a world-wide reputation and the defendant had so closely copied the plaintiff's padlock in form, size, coloring, lettering and details of finish so that purchasers were induced to buy defendant's padlock supposing it to be the padlock of the plaintiff. In the case of *John H. Rice & Co. v. Redlich Mfg. Co.*, 202 Fed. 155 (C. C. A. 3), the court distinguished the *Yale* case. We quote a portion of the court's opinion making this distinction:

“The case differs from that of *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37 (83 C. C. A. 149), much relied upon by the appellees *in which certainly the doctrine of unfair competition has been carried to the utmost verge*, as was said by the court in *Rushmore v. Manhattan Screw & Stamping Works*, 163 Fed. 939 (90 C. C. A. 299). (Emphasis added.) It is to be observed, however, that in *Yale & Towne Mfg. Co. v. Alder*, the charge of unfair competition was

that the defendant had so closely copied the defendant's padlock in form, size, coloring, lettering and details of finish, as that purchasers would likely be induced to buy his padlock supposing it to be the padlock of the plaintiff."

In this case the court also said:

"So a person may manufacture and sell an unpatented article that has been previously manufactured by another without being guilty of unfair competition, even though in all essential features the one article is an exact simulacrum of the other."

In the case of *Globe-Wernicke Co. v. Fred Macy Co.*, 119 Fed. 696 (C. C. A. 6), the court held the patent invalid by virtue of lack of invention. Plaintiff urged his cause of action in unfair competition. The court there held that a claim of unfair competition could not be sustained where the patent was held invalid. So also in the case of *St. Paul Electric Co. v. McCrum-Howell Co.*, 189 Fed. 849 (C. C. A. 8) the court held that the manufacturer of an electric suction cleaner for domestic use not protected by patent or trade-mark was not entitled to a preliminary injunction to restrain as unfair trade the making and selling by defendant of a similar article merely because for practical and economical reasons materials and form of the two articles were substantially alike, nor because defendant may have designed to obtain some advantage from plaintiff's advertising, where it was not shown that it attempted or intended to sell its machine as that of plaintiff's *but plainly marked it by a plate giving it a different name.*

The evidence must be unmistakably clear and beyond question to justify an injunction against unfair competition where the patent has been held invalid and unfair

competition is predicated upon similarity in constructions common to or characteristic of articles manufactured by complaining party, especially when resulting from effort to comply with physical requirements essential to commercial success.

*Kawneer Co. v. McHugh*, 51 F. 2d 560 (Dist. Ct. Pa., 1931).

Plaintiff cites the case of *Rushmore v. Manhattan Screw Co.* (C. C. A. 2). The court in that case held that the plaintiff was entitled to be protected from unnecessary imitation of non-functional parts of his well known lamp which had "graceful design." We have no quarrel with that principle of law, but we emphasize that in that case the court found the existence of a non-functional feature in the graceful design and appearance of plaintiff's lamp. In that case the court also found that plaintiff's article was a well known article of commerce, but even in this case the court recognized that it was extending the doctrine of unfair competition to its utmost limit when it said:

"We are of the opinion, however, that to answer this question in favor of the complainant carries the doctrine of unfair competition to its utmost limit. If it be pushed much farther, those engaged in trade complaints over the petty details of business and thus will be encouraged to run to the courts with trivial will grow up a judicial paternalism which in time may become intolerable."

One of the judges of this court wrote a dissenting opinion. Later cases have not extended the principle of unfair competition on non-functional features as far.

In the case of *Electric Auto-Lite Co. v. P. & D. Mfg. Co., Inc.*, 78 F. 2d 700 (C. C. A. 2, 1935), the defendant

manufactured and sold replacements for detachable and worn parts of automobile ignition systems manufactured by plaintiff. Plaintiff used the trade-mark "Auto Lite" and defendant in its catalogs and advertisements used the phrase "to fit Auto Lite" and represented that parts were correct size to replace plaintiff's parts and plaintiff's igniter equipment, and defendant referred to plaintiff's corresponding numbers describing the parts. In spite of all these facts, the court held that there was no unfair competition, and the court said:

"If it be true, as asserted, that as soon as the plaintiff put a part on the market the defendant copied it in every detail and competed with the plaintiff in its sale, the defendant still would not be liable for unfair competition. It always marked the repair parts put out by it with its trade mark. The evidence discloses that invariably every feature of the plaintiff's parts which are copied by the defendant is functional and necessary to the practical operation of the part. The parts are utilitarian in every detail, and do not contain any ornamental features. Under these circumstances it cannot be said that defendant indulged in unfair competition by selling parts which look like those of the plaintiff's manufacture. No rule of law forbids a manufacturer from copying the features of the article which are essential to its use. Plaintiff has not shown that there is any feature of the part manufactured by which it is not necessary for the proper operation of such part. Therefore, there was no unfair competition in manufacturing copies of such parts. *A. C. Gilbert Co. v. Shemitz*, 45 Fed. 2nd 98 (CCA 2); *Luminous Unit Co. v. R. Williamson & Co.* (DC 241 Fed. 265); *Marvel Co. v. Pearl*, 133 Fed. 160 (CCA 2)."

The case of *Maytag Co. v. Meadows Mfg. Co.*, 35 F. 2d 403 (C. C. A. 7), stands for the same proposition. In that case the court held:

“In suit in which plaintiff claimed defendant had copied essential and non-essential features of its unpatented power washing and wringing machine, defendant held to have done no wrongful act in copying or duplicating plaintiff’s unpatented combination, though both machines were painted the same color, which is light gray, and both tubs were rectangular in shape.”

See also:

*Daniel v. Electric Hose & Rubber Co.*, 231 Fed. 827 (C. C. A. 3);

*Harvey Rubbel, Inc. v. General Electric Co.*, 262 Fed. 155 (Dist. Ct. N. Y.);

*William L. Keller, Inc. v. Chicago Pneumatic Tool Co.*, 298 Fed. 52 (C. C. A. 7).

In this case the court held that at the expiration of the period of a valid patent, anyone could make a Chinese copy of such article unless the patent is provided with a special dress or artistic adornments that are in no way involved in any of the patent claims. The court said:

“If the structure which the patentee makes pursuant to his patent is an embodiment of the elements of the claims or a claim therein, and contains no artistic or distinguishing marks, but is strictly a utilitarian article, where simplicity of structure and cheapened cost of production are not inherent in the combination and constitute its virtue, then the mere fact that a Chinese copy is made does not impose on the maker the burden of establishing his good faith or the absence of unfair trade methods.”

**C. There Has Been No Palming Off on the Public of Defendant's Hardware as That of the Plaintiff, and the Public Has Not Been Misled as to the Origin of Defendant's Hardware.**

Plaintiff claims that at the time Halopoff commenced making the garage hardware in suit that plaintiff's hardware was well known to the trade. This contention is not supported by the evidence in the record. According to plaintiff's own testimony, he made the first commercial sale of the structure like the patent in suit either in February or March, 1949 [R. 149]. Plaintiff did not remember to whom he made such sale, nor did he know the earliest date that he published any literature for distribution of the hardware in suit [R. 161].

Plaintiff sells his hardware to wholesalers and dealers under the trade name "Econo Jamb" [R. 165]. On July 12, 1949, Vimcar gave plaintiff its first purchase order for garage door hardware [R. 89]. The first purchase order of Vimcar to Halopoff was on February 7, 1950 [R. 73]. Plaintiff obtained the patent in suit *July 25, 1950*. Thus, according to plaintiff's own testimony, his hardware was out in the market but approximately eleven months when Halopoff started to manufacture his hardware. It was only out in the market approximately three and one-half to four months when the first sale was made to Vimcar. All sales made by plaintiff, other than to Vimcar, were made under his trade name "Econo Jamb." All sales by Vimcar were under its trade name "Olympic." Plaintiff offered no evidence as to the number of sets sold by him prior to July 12, 1949, under the name of "Econo Jamb." In light of these facts, plaintiff's claim that on July 12, 1949, his hardware in suit was well known to the trade is not understandable.



No evidence was introduced to prove that plaintiff had established any good will in connection with his hardware as early as July, 1949. Long prior to July, 1949, Vimcar had established its own good will, under its own trade name "Olympic" in the sale and distribution of the garage door hardware. It is well known that wholesalers and dealers are a class of discriminating buyers. They know what they are getting before they purchase the commodity. There is not a thread of evidence in the record to support the contention that Vimcar ever palmed off on the public Halopoff's hardware as that of plaintiff. No evidence was introduced to prove a single executed sale by Vimcar of Olympic garage door hardware manufactured by Halopoff as being palmed off or represented as that of plaintiff's hardware.

The only evidence on a direct and completed sale of Olympic hardware which the plaintiff produced at the time of trial was the testimony of Mr. Walizer [R. 286]. This witness testified that he purchased a set of garage door Olympic hardware from Builders Emporium (manufactured by Halopoff) *and immediately knew* it was not built by Sturdee (plaintiff's hardware). He further testified that there was no comparison in the sets, and that Vimcar's hardware was a much lighter set. In the words of the witness "*There is no comparison.*" (Emphasis added.) [R. 286.] The importance of this evidence cannot be overlooked because this witness had purchased garage door hardware from Builders Emporium when it was manufactured by plaintiff. Yet two weeks before trial when he bought a set of garage door hardware from the same concern which was sold under the trade name "Olympic" he immediately knew that plaintiff did not manufacture that set of hardware.

**There Is No Secondary Meaning.**

The cases are uniform in holding that if an article has been on the market but a short time and is not known to the buying public, and no secondary meaning has yet been obtained in connection with said commodity, that no purchasers could be deceived by the sale of articles manufactured by a competitor. In the case of *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26 (C. C. A. 6), the court said:

“The essence of the wrong in unfair competition consists in the sale of goods of one manufacturer or vendor for those of another, and the copying by one manufacturer of stoves of an unpatented design of a stove made by another, only a few of which had been sold, so that it was not known to the buying public, and no purchaser was deceived, the characteristic marks of the original designer being removed and those of the maker being substituted, did not constitute unfair competition which would sustain a suit for injunction.”

No right of action exists unless it is shown that customers were misled.

*Newcomer & Lewis v. Scriven Co.*, 168 Fed. 621 (94 C. C. A. 77);

*Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 9 S. Ct. 166, 168.

The adoption by one manufacturer of the characteristic features of another's product common to articles of that class does not of itself amount to unfair competition (*Rathbone, Sard & Co. v. Champion Steel Range Co.*, *supra*).

Unfair competition as used in Civil Code, Section 3369, of California, has been defined in the case of *International, etc. v. Landowitz*, 20 Cal. 2d 418, 421-422. The court held there that the words "unfair competition" as used in Civil Code, Section 3369, means "unfair or fraudulent business practices and ordinarily involves the fraudulent passing off of one person's goods as those of another."

In the absence of some recognized right of common law, or under the statutes, a man's property is limited to the chattels which embody his invention, and others may imitate these at their pleasure."

All garage door hardware, regardless by whom manufactured, are packed and sold in similar cartons. This must necessarily follow from the structure itself. Plaintiff is not entitled to a monopoly of the carton or package in which the hardware is packed and sold. If defendants have so named and identified their garage door hardware with a trade name or mark that a purchaser who exercises ordinary care in examining it can ascertain the origin, defendants have fairly discharged their duty to the public. They are then guiltless of that deceit which is an indispensable element of unfair competition. The fact that anyone might be deceived by the size, shape and general construction of the garage door hardware does not help plaintiff's case. All these features are old, separately and in combination, and are used generally by all manufacturers in the construction of garage door hardware.

See *Southern California Fish Co. v. White Star Canning Co.*, 45 Cal. App. 426.

Plaintiff in his brief argues that Vimcar was required to give notice to the trade when it changed from plain-

tiff's hardware to Halopoff's hardware. This same contention was urged in the trial court without success. The trial court held such proffered evidence immaterial by virtue of the fact that Vimcar was selling all types of garage door hardware under its own trade name "Olympic" [R. 91].

**D. The Use by Vimcar of Instruction Sheets Stuffed in Each Carton Containing the Garage Door Hardware and Which Were Printed and Paid for at Its Own Cost, and the Use by Vimcar of Photographs of Garage Door Hardware in Its Catalogs, Did Not Constitute Unfair Competition.**

Vimcar had been using illustrations of Olympic jamb type hardware prepared by its own employees, at its own expense, long before it did any business with the plaintiff [R. 233; Deft. Ex. Y]. Vimcar had used flyers and advertising sheets prepared by its own employees, and at its own expense, and mailed to its customers, showing Olympic jamb type hardware [Deft. Exs. Z and Z-1]. These forms of advertising were prepared in 1949. Plaintiff did not furnish Vimcar any cuts at any time. Vimcar made its own cuts.

The instruction sheets used by Vimcar are not sales aids and therefore have no bearing on the question of unfair competition. The direction or instruction sheets apply to virtually any type of hardware and are freely used in the trade as evidenced by the instruction sheets introduced in evidence and used by other manufacturers [R. 228]. They are more or less basically the same, and have been and now are in the public domain. In fact, the body of the advertising could readily be contended as the property of Vimcar rather than that of plaintiff be-

cause it originated, at least as to use in many respects, with Vimcar. It shows Vimcar's trade-mark "Olympic," and Vimcar's corporate name and address.

No copyright was ever sought or obtained by the plaintiff for the instruction sheets. Wholesalers and dealers would likely never see the instruction sheets, and only the person who would ultimately install the hardware would have any use for the instruction sheet.

It has been held that the use of manuals or instruction sheets by competitors does not constitute unfair competition. (See *Meccano v. John Wanamaker, New York*, 250 Fed. 450 (C. C. A. 2). There can be no monopoly of descriptive language. In the case of *International Heating Co. v. Oliver Oil Gas Burner and Machine Co.*, 288 Fed. 708 (C. C. A. 8), the court said:

"Words are but symbols. In combination they express ideas. They are not information; they convey information. Information conveyed by words may be confidential, not the words. There can be no monopoly of descriptive language."

The court also said on page 712:

"In every advertisement found in the record, each party made prominent its name and address, as well as the distinctive name of its burner, plaintiff being called the 'Oliver Oil Gas Burner,' and that of the defendant company, 'Instant Gas Oil Burner.' Each has a cut showing a woman by a stove, but the similarity is not such as to mislead. Especially is this true when it is remembered that we are here dealing with advertisements, and not with the dress in which the burners of the respective parties are offered to customers over the counter by retail dealers. . . . Plaintiff's advertisement described the Oliver oil gas

burner and gave the name of Oliver Oil Gas Burner and Machine Co., with its address. The advertisements of the defendant company described the Instant gas and oil burner and gave its name as International Heating Co., with its address. No sensible person acquainted with plaintiff's advertisements would believe that the defendant company was advertising and selling plaintiff's burner."

As to the photographs, they were taken at the request of Vimcar. They were furnished Vimcar without restriction or condition, and for insertion in its own advertising publications. These photographs merely show a set of garage door hardware. The photographs do not depict the item according to scale, or detail, and are merely for pictorial purposes. Anyone looking at a photograph in Vimcar's catalog could not be confused that Vimcar was trying to palm off on the public as its own the hardware of plaintiff. In the case of *Lamb v. Grand Rapids School Furniture Co.*, 39 Fed. 474, rival manufacturers of furniture issued similar catalogs. They were manufacturing similar furniture. In that case the court said:

"The manufactures of the complainants are not patented. The defendants may lawfully manufacture just such goods. Can they not publish correct illustrations of them as adjuncts of their sale? Ought they to be restrained from doing this because the complainants, having done the same thing, have copyrighted illustrations which, while representing their own goods, represent those of the defendant also? It is clear that the books of both parties are published and used solely as a means for advertisement. To say the defendant has not the right to publish correct

illustrations of its goods must practically result in creating a monopoly, in goods modeled on those designs, in the complainants, and thus give all the benefits of the patent upon unpatented articles. Plaintiff's case here is much weaker, because it does not claim to have any copyright on the photographs or the instruction sheets. In the case of *J. L. Mott Iron Works v. Clow*, 82 Fed. 316, 27 C. C. A. 250, the complainant had issued a price catalog containing illustrations of its wares, such as wash bowls, bathtubs, foot baths, etc., and the court held that such articles could not be the subject of artistic treatment, and therefore were not a proper subject of a copyright; hence, it refused to enjoin the defendant from copying the designs or cuts found in the catalog of the complainant or their publication in the catalog of the defendant."

The case of *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 845, this follows the general rule.

In the case of *Bickmore Gall Cure Co. v. Karns*, 134 Fed. 833 (67 C. C. A. 439), the court said:

"Undoubtedly where two persons are engaged in selling like goods, neither of them has or can acquire the exclusive privilege to amply designate and describe them, or to attractively present them for sale with appropriate directions for their use."

A case most nearly like the one here is *Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, Dist. Ct., 216 Fed. 401. In that case there were two rival manufacturers, one of whom was making, advertising and selling articles which were imitations except in minor detail of those made and sold by the complainant. The evidence was held insufficient to

establish the charge of unfair competition, or to entitle complainant to an injunction. In reference to cuts and pictures which defendant copied from complainant's catalog, the court said:

“Regarding the cuts and pictures in complainant's catalog and its circulars and advertising matter, which it is claimed the defendant company copied, it appears that the catalog was not copyrightable. As a proper and necessary means of advertising, it was distributed to complainant's customers and used in soliciting trade, and was designed to reach an indefinite number of dealers, who, in transacting their business were at liberty to exhibit it to a still larger number of customers. The Tubbs company's catalog was issued for the purpose of advertising its goods for sale and promoting its trade by the sale of its manufactured articles, and, such being the fact, if it did copy from complainant's catalog cuts of articles which it might sell as well as the complainant, it committed no offense of which the court can take cognizance. (Citations.) Without enumerating the differences between the two catalogs, suffice it to say that they are so apparent as to preclude belief on the part of the customer of ordinary intelligence that the defendant's catalog is an advertisement of the complainant's wares, and there was consequently no invasion in this respect of complainant's rights, nor was there any such invasion, on the facts of this case, by the defendant, by its copying from the complainant's catalog and circulars descriptive matter, weights, dimensions, and the like, insofar as that was done. *Potter Drug and Chemical Corp. v. Pasfield Soap Co.*, C. C. (102 Fed. 490).”



The same principle was followed in the case of *Benjamin T. Crump Co. v. J. L. Lindsay, Inc.*, 107 S. E. 679, Sup. Ct. of App. of Va., in which the court said:

“There was no unfair competition on the part of the jobber in automobile accessories to photograph certain pages in a competitor’s catalog and to include them in its own, there being no deceit of the public or attempt to palm off goods as those of its competitor; the catalogs being easily distinguished from each other.”

See also:

*Germanow v. Standard Unbreakable Watch Crystals*, 27 N. E. 2d 212 (1940 St. of Appeal, N. Y.).

### Conclusion.

The structure of the patent in issue presents but a very meagre change from adjustable jamb type hardware of prior inventors and in the public domain. The change proposed by the patent is not even an advantageous change but merely a mechanical alternative. Prior structures evidencing every single structural member in precisely the same combination as the alleged patented device have been amply proved. Defendants did no more than appropriate what was in the public domain and available to everyone.

The patent was inadvertently issued inasmuch as the abundant prior art was not known nor considered by the Patent Office.

Defendants were doing no more than continuing the carrying on of a business already established in the sale of adjustable jamb type hardware when they changed from such hardware previously purchased from a variety of sources to such hardware purchased from the Defendant Halopoff. The goods were at all times sold as Vimcar's own merchandise. Elements of unfair competition are clearly and emphatically absent to the extent that it is apparent that the unfair competition cause was merely added to cast an unwarranted reflection upon a routine patent case.

It becomes clear therefore that the decision of the lower court should be sustained in its entirety.

Respectfully submitted,

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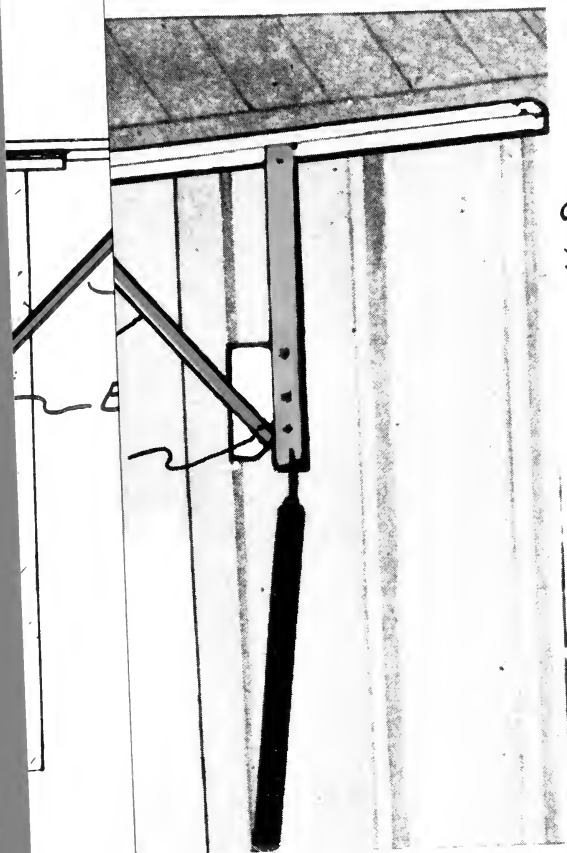
APPENDIX.



PLATE A

STRUCTURES ANTEDATING

RE 1 FIGURE 3



BOARD

42 R

R.406 COFFEE

41

R.296e 1947 R.10

, Rent 4, R.406

945

413 t at A or B



No. 13490

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROSCOE FOWLER,

*Appellant,*

*vs.*

VICMAR SALES COMPANY, VICTOR M. CARTER and MOR-  
RIS J. HALOPOFF,

*Appellees.*

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REPLY BRIEF OF APPELLANT.

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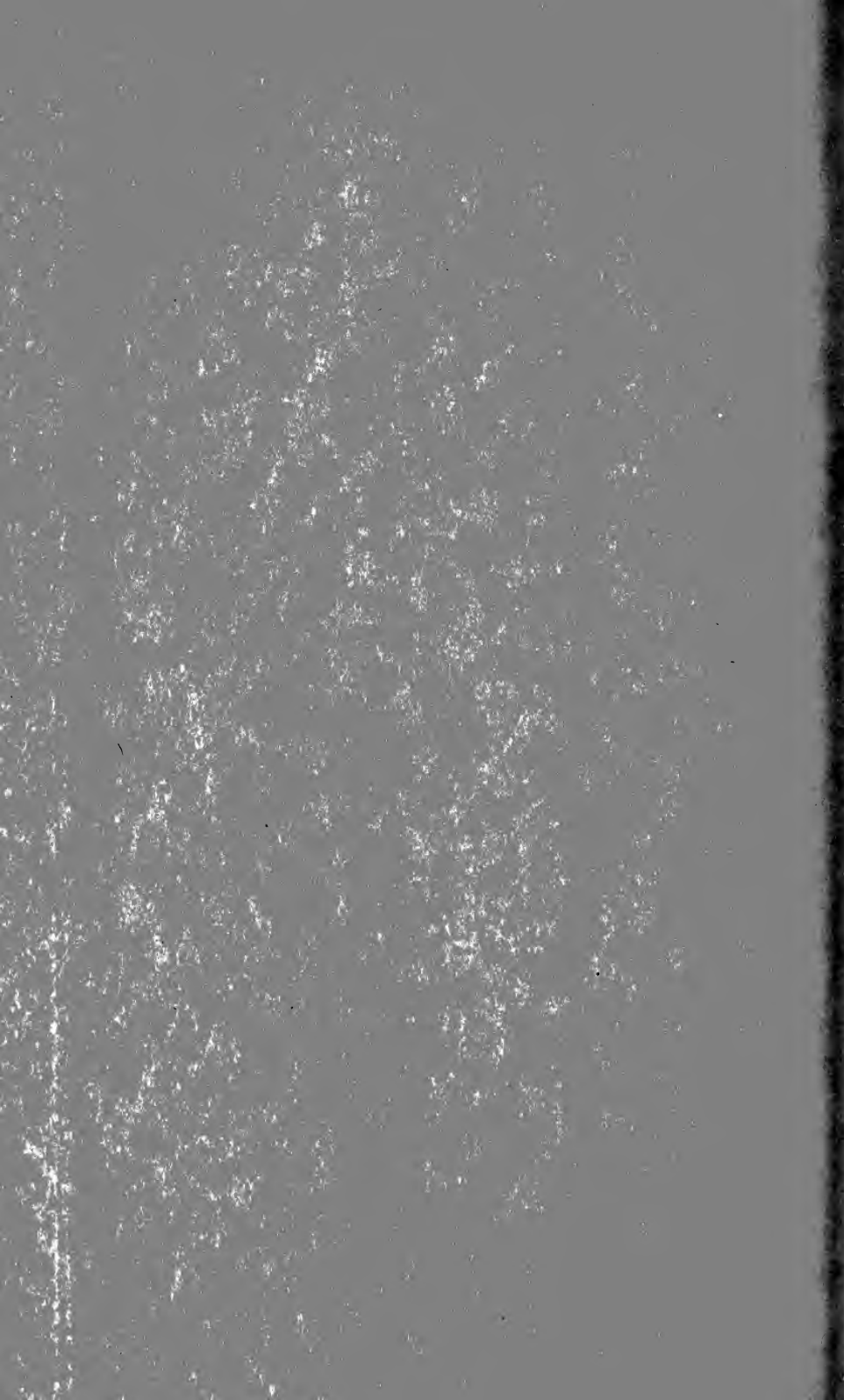
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FILED

MAY 14 1953

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*Appellees.*

---

## REPLY BRIEF OF APPELLANT.

---

Defendants' brief purports to advance a number of grounds in support of the decision below. Actually, however, the various points are largely repetitions of other points differently stated, none of which are supported in the record.

Defendants admit (Br. p. 17) that their prior art patents are not particularly pertinent, and at (Br. p. 33) they explain why. Defendants' statement in this regard that "The Wolf patent shows only *pivot* hardware" is particularly illuminating in view of defendants' reliance on *pivot* hardware elsewhere in their brief.

The points raised in defendants' brief will be treated *seriatim* using defendants' lettering for identification.

## Part I.

### A.

Contrary to defendants' assertion, the joint Fowler-Murphy patent 2,523,207 is not prior art, since it was copending with the patent in suit. Furthermore, the joint patent is not material since it is directed to an entirely different invention and shows no solution of the problem solved by the patent in suit. The weakness of defendants' over-all position is clearly demonstrated by their reliance on this joint patent as an alleged defense.

Of the cases relied on by defendants (Br. pp. 10-13) as authority for this procedure, *International Seal v. Brooks*, and *Permo v. Hudson-Rose* have no relevance here whatsoever since they did not involve co-pending applications of the inventor of the patent in suit. In the *International* case, Keidel, the sole inventor of the patent there in suit was not a co-inventor of the joint patent of Klein and Kasanof. The same was true in the *Permo* case. The joint inventors of the reference patent were strangers to the patent in suit and the only issue was priority of invention between the joint inventors of the one patent and the sole inventor of the other.

The *Denaro v. Maryland* case was not a Court of Appeals decision as stated in defendants' brief (p. 12), but was a District Court decision wherein the Trial Judge said that the plaintiff was not entitled to be treated as the sole inventor of the joint patent. The *Kendall v. Tetley* case involved a situation where a sole inventor of a basic idea in fabric later filed a joint application with another for using the fabric for tea bags and the Court held that the earlier filed sole patent had exhausted the inventive concept.

*Dwight & Lloyd v. Greenawalt* was a case where Dwight obtained a sole patent on an invention made by him jointly with another. The same invention was involved in both the joint and sole applications, and the Court held that the earlier anticipated the later. Obviously, Dwight was not entitled to two patents on the same invention.

The defendants apparently seek to bring themselves under the rule of *Milburn v. Davis-Bournonville*, 270 U. S. 390, which holds that as between two patents issuing to different persons on the same invention, the patent having the earlier filing date can be cited against the later patent on the question of who is the first inventor.

However, defendants clearly have not sustained their burden of proving that someone else was the first inventor of the combination claimed in the Fowler patent in suit by merely showing that some of the elements of the claimed combination are also shown in a co-pending but later issued Fowler joint patent. This obviously does not prove that someone else, presumably plaintiff's employee Murphy, was the first inventor of the combination claimed in the patent here in suit. Defendants have made no effort to sustain their burden of proving that Murphy invented or contributed any of the elements which are common to the two patents, absent which they are not entitled to rely on said joint patent as prior art.

Furthermore, even if the Fowler joint patent could be considered part of the prior art, still it has no probative effect here, since it is not for the same invention as the patent in suit. The *Milburn v. Davis-Bournonville* case makes it quite clear that the earlier filed application must not only be by a stranger, but must also anticipate, *i. e.*, must disclose the entire invention claimed in the patent

in suit. Here also, defendants' proofs fail to sustain their position. There is no anticipation and there is no double patenting.

Defendants' statement that the claims in suit are anticipated by the Fowler joint patent is simply not correct.

As pointed out in our Opening Brief, pages 43, 44, the hardware of the joint patent is entirely different in purpose and function from that covered by the patent in suit. The essence of the joint patent is the positioning lever 14 to which the cantilever arm 15 is pivotally attached to give a peculiar jackknife linkage useful where almost no head-room is available.

As distinguished from this, the structure of the patent in suit has no positioning lever at all, but instead pivots the cantilever arm directly to the jamb bracket, as specifically set forth in element (e) of claim 1, quoted on page 9 of defendants' brief. In the jackknife linkage of the joint patent the adjustability of the power and cantilever arms is for a totally different purpose and is not covered by the claims in suit.

The plaintiff here is not claiming to be the inventor of the individual elements *per se* of his patented structure, but only of his novel combination of those elements to produce a demonstrably and admittedly better structure. Defendants' attempt to twist the claims in suit to read on the Fowler joint patent is clear proof of the novelty of plaintiff's structure here in suit.

#### B, C. D.

Sections B, C and D, pages 13-25 of defendants' brief all deal with the same subject matter, all being directed to uses and publications alleged to be prior to plaintiff's invention. These were fully discussed in our opening

brief wherein it was pointed out that not one of the alleged prior uses or publications shows plaintiff's combination of elements, and more specifically not one shows plaintiff's method of adjusting the door.

Defendants' Plate A purports to summarize the alleged prior uses stated by defendants (Br. p. 17) to be their "most pertinent prior art."

However, of the four types of hardware shown in Plate A, those illustrated in Figs. 1 and 3 show no adjustment of the door at all, and Figs. 2 and 4 admittedly do not show plaintiff's means of adjustment. Fig. 2 does not correctly illustrate the McFadden hardware of Exhibit N, and the Winchel and Martlin-Murphy types of hardware, Exhibits R, L and J illustrated in Fig. 2, not only employ different adjusting means but were not proved to be prior to plaintiff's invention.

The Tavart hardware shown in Fig. 4 and discussed at page 13 of defendants' brief, is clearly different from plaintiff's hardware since it adjusts the door not by adjusting the cantilever arm, but by moving the pivot pin of the arm from one position to another in a slot in the jamb bracket. The obvious disadvantages of this approach to the problem were fully discussed in our opening brief.

Defendants by their discussion of Plates A and B, infer that the issue of this case concerns solely the *location* of the means for adjusting the door. By thus contending, they seek to divert attention from the real issue which is the particular means used and its interrelationship with the other elements of the claimed structure.

We concede that other and different means located at other and different places are shown in other hardwares for adjusting the position of the door, but those other

means are all outside the claims of plaintiff's patent. We are concerned here only with the structural combination shown and claimed in the patent in suit, and deliberately copied by defendants.

If defendants think so highly of these other structures with their different means of adjusting the door, why did they not copy one of them, instead of plaintiff's precise structure with its particular means of adjustment?

Defendants make much of the simplicity of plaintiff's invention and seek to belittle his invention by saying that all plaintiff did was to substitute this for that, omit parts, change locations of parts, and so on. The best answer to these familiar tactics common to all deliberate infringers who meticulously copy the patentee's claimed structure was given by this Court in the recent case of *Patterson-Ballagh v. Moss*, 96 U. S. P. Q. 206, decided January 27, 1953, in which the Court answered a similar attack made by the defendant there by saying:

“It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art. ‘Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention.’ *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, 220 U. S. 428, 435 (1911).”

There as here the defendant was quick to recognize the merit of the patented device over other devices available to it on the market and previously used by it. There as



here the patent in suit was admittedly a narrow patent in a crowded art, but it, like the patent here, solved a real problem. And there as here, the defendant came into Court with various and sundry reasons why the Patent Office should never have granted the patent. However, this Court unequivocally rejected these various contentions of defendant, saying:

“Appellants had the burden of proof on the question of the validity of the Moss patent since a presumption of validity arises from the issuance of a patent. *Mumm v. Jacob E. Decker & Sons*, 301 U. S. 168, 171 (33 U. S. P. Q. 247, 248-249) (1937); *Radio Corporation of America v. Radio Engineering Laboratories, Inc.*, 293 U. S. 1, 7 (21 U. S. P. Q. 353, 355) (1934). Reasonable doubt must be resolved in favor of the validity of the patent. The presumption created by the action of the Patent Office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear and convincing proof. \* \* \*

The holding in the *Kwikset* case cited in defendants' brief is not in conflict with this Court's decision in the *Moss* case, nor with plaintiff's position in this case, for we have here no question of merely aggregating or accumulating old elements as was the situation in *Kwikset*, but on the contrary, we have here a real and novel combination in the truest sense of the word, where all of the elements co-act to produce a new and better result, just as in the *Moss* case.

#### E.

Recognizing the weakness of their position in attempting to rely upon the joint Fowler-Murphy patent to defeat the Fowler patent in suit, the defendants sought to bolster

this alleged defense by testimony that the structure shown in the joint application was made and sold more than a year prior to the patent in suit and was therefore a statutory bar.

To accomplish this they produced the witness McFadden who had worked for plaintiff for three months in 1946 [R. 125], six years prior to the trial, to testify on the subject. That McFadden in 1952 was thoroughly confused both as to what the drawings of the joint patent showed, and as to what products were being sold by Fowler in 1946, as distinguished from what was being experimented on, is clear from his testimony as a whole.

In his colloquy with the Court, McFadden tried to bring out that the structure being sold in 1946 was not adjustable to plumb the door, but did, he thought, have two limiting positions defined by spaced holes, so that it could be differently balanced for different sized, seven foot and eight foot doors. This was clarified by McFadden on page 141 of the record, last four lines, where he said

“Yes. That was put in there for that purpose, but not to make a vertical adjustment on the door. This has nothing to do with making vertical adjustment on the door.”

And also see pages 142 and 143 of the record.

Later in discussing McFadden's own hardware [Ex. N] made after he left Fowler's employ, the Court asked [R. 148]:

“Why didn't you ever use the slotted arm? You knew of the slotted arm door,”

and the witness replied:

“Not at the time I made this, I did not know of the slotted arm,”

which clearly shows that whatever it was that McFadden worked on at Fowler's plant in 1946, it certainly was not a slotted arm.

Subsequently, McFadden independently went out and checked some early Fowler jobs to see if he had been correct in his former testimony concerning what Fowler had sold in 1946. Before the trial was concluded, McFadden came back voluntarily and testified that part of his earlier testimony had been in error. At R. 253, McFadden unequivocally stated that the cantilever arm on the Fowler Lo-Head hardware sold in 1946 was not adjustable.

“A. It was not made in two pieces.”

And with respect to the two-piece arm, that [R. 254]:

“A. We had it for experimental purposes. None of them were sold.”

On pages 254 to 260, McFadden fully explained how and why he had checked up on his earlier statements and why he wanted to put the record straight.

“I found out afterwards that it was not correct, and I wanted to correct it.” [R. 260, top of page.]

It is apparent therefore that defendants' quotation on page 27 of their brief from McFadden's testimony tells only a part of the story—a part which was repudiated by McFadden after he had an opportunity to check up on the facts.

McFadden's corrected testimony with respect to what was sold in 1946 was fully corroborated by Fowler at R. 170, 171.

F.

This section of defendants' brief has no basis in fact and the point attempted to be made is fallacious and irrelevant on its face. Plaintiff did not conceal or suppress the drawing in question or any other evidence.

In the first place, Fowler volunteered information concerning the drawing Exhibit P [R. 150], and later a copy was given to defendants' counsel in open court [R. 157, 158].

“Mr. Fulwider: We have a copy here you are very welcome to have, if you had just asked for it.”

In the second place, the drawing states on its face that it is of “Olympic” hardware, which is the name used by defendants for hardware purchased from plaintiff—and the first such purchase was in 1949. The date of 1948 on the drawing therefore is obviously in error, since there was no such thing in 1948 as “Olympic” hardware made by plaintiff. The testimony of Carvel Moore [R. 237-52] clearly explains that the number 491 on the drawing indicated that the drawing was made in 1949.

Furthermore, there is no evidence of any sales of said hardware by plaintiff in 1948, and therefore if the date on the drawing was correct, it would do nothing more than carry plaintiff's date of invention back several months to a time in 1948. If anything, this would be helpful to plaintiff's case, not detrimental to it. Defendant asserts that the drawing was material. But nowhere does defendant tell us how it was material.

All of the hullabaloo at the trial, and defendants' discussion in their brief concerning Exhibit P, was and is, merely a smoke-screen to try and becloud the issues. It has absolutely nothing to do with the merits of the case, or plaintiff's conduct thereof. It is a “red-herring,” pure and simple.

G.

In this section, defendants after pointing out that patents showing adjustable arms in "pivot" hardware are not pertinent to the issues here, assert that if the Examiner had had the defendants' "prior uses" before him, he would not have issued the patent in suit. Taking these so-called "uses" in the order named by defendants (Br. p. 34) we see that they could not possibly have changed the Examiner's thinking.

Exhibits B-1 and B-5, illustrating Standard and Lo-Head respectively, show no means at all of adjusting the door. The Tavart hardware, Exhibits C-1 and D, are the same as shown in the Smith patent, Exhibit T, which was co-pending with the patent in suit and which the Examiner did not think close enough to put in interference with plaintiff's patent. The only adjustability shown in the Coffey hardware of Exhibit C-4 is in the "pivot" set in the left-hand photo. No adjustment at all is shown for the jamb hardware in the other photo. Winchel's hardware, Exhibit J, was not proved to be prior to Fowler and besides it adjusts by having a slot in the door rail in which a pivot pin is slid. McFadden, Exhibit N, is similar to Winchel but more complicated, and likewise different from plaintiff's hardware.

Certainly, none of these so-called "prior uses" could have carried any weight at all with the Examiner. They merely represent a series of abortive efforts on the part of persons skilled in the art to solve the problem first successfully solved by plaintiff. They are merely cumulative failures now put forward by defendants as meritorious ideas in defendants' attempt to discredit plaintiff's invention. Again we ask, if these other hardwares solved the problem, why did not defendants copy them instead of plaintiff's?

## Part II.

Defendants attempt to excuse their copying and other unfair trade tactics on the ground that plaintiff's patent had not issued when defendants first started said unfair practices. This is beside the point. The practices were just as unfair before the issuance of plaintiff's patent as they were after its issuance.

The secondary meaning which attached to plaintiff's hardware was not because of the patent, but arose because of the novelty of its construction and appearance. All of the door hangers called by plaintiff as witnesses testified unequivocally that plaintiff's hardware was distinctive in appearance and called plaintiff to mind as the source of said hardware whenever they saw it.

Nothing more need be said in reply to this part of defendants' brief. It is amply refuted in plaintiff's opening brief.

### Conclusion.

Defendants' protestations to the contrary, the evidence is clear that defendants deliberately copied the precise hardware defined by the claims of the patent in suit, which was duly and legally issued to plaintiff for his invention. The judgment below should be reversed and the case remanded for an accounting and the issuance of an injunction against further infringement.

Respectfully submitted,

FULWIDER, MATTINGLY & BABCOCK, and  
ROBERT W. FULWIDER,

By ROBERT W. FULWIDER,

*Attorneys for Appellant.*

No. 13494

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United States  
Court of Appeals  
for the Ninth Circuit

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ALASKA AIRLINES, INC., a Corporation,  
Appellant,  
vs.  
ARTHUR W. STEPHENSON,  
Appellee.

---

Transcript of Record

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Appeal from the United States District Court for the  
Territory of Alaska, Third Division

FILED

JUL 1 1953

PAUL P. O'BRIEN  
CLERK





United States  
Court of Appeals  
for the Ninth Circuit

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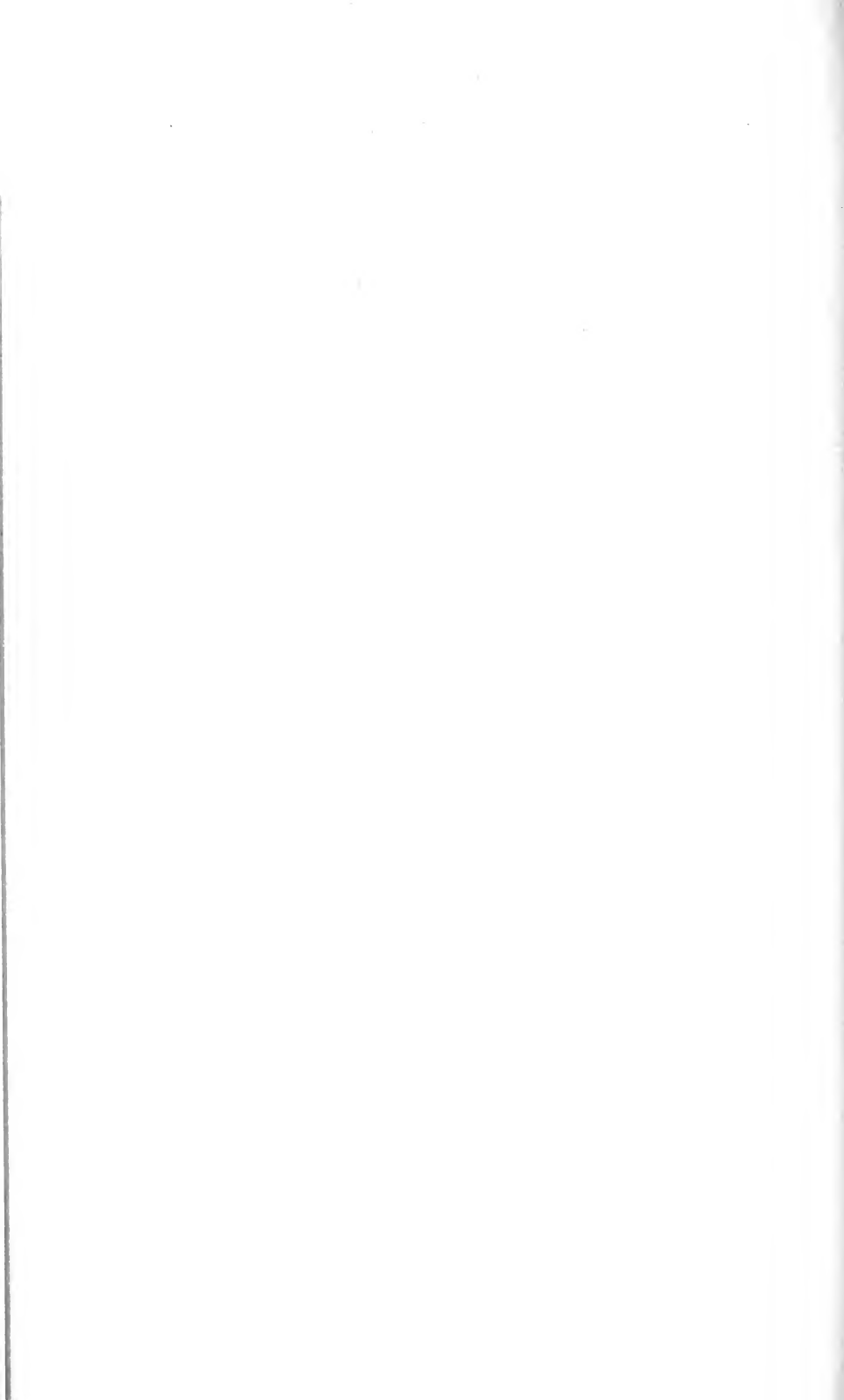
ALASKA AIRLINES, INC., a Corporation,  
Appellant,  
vs.  
ARTHUR W. STEPHENSON,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
Territory of Alaska, Third Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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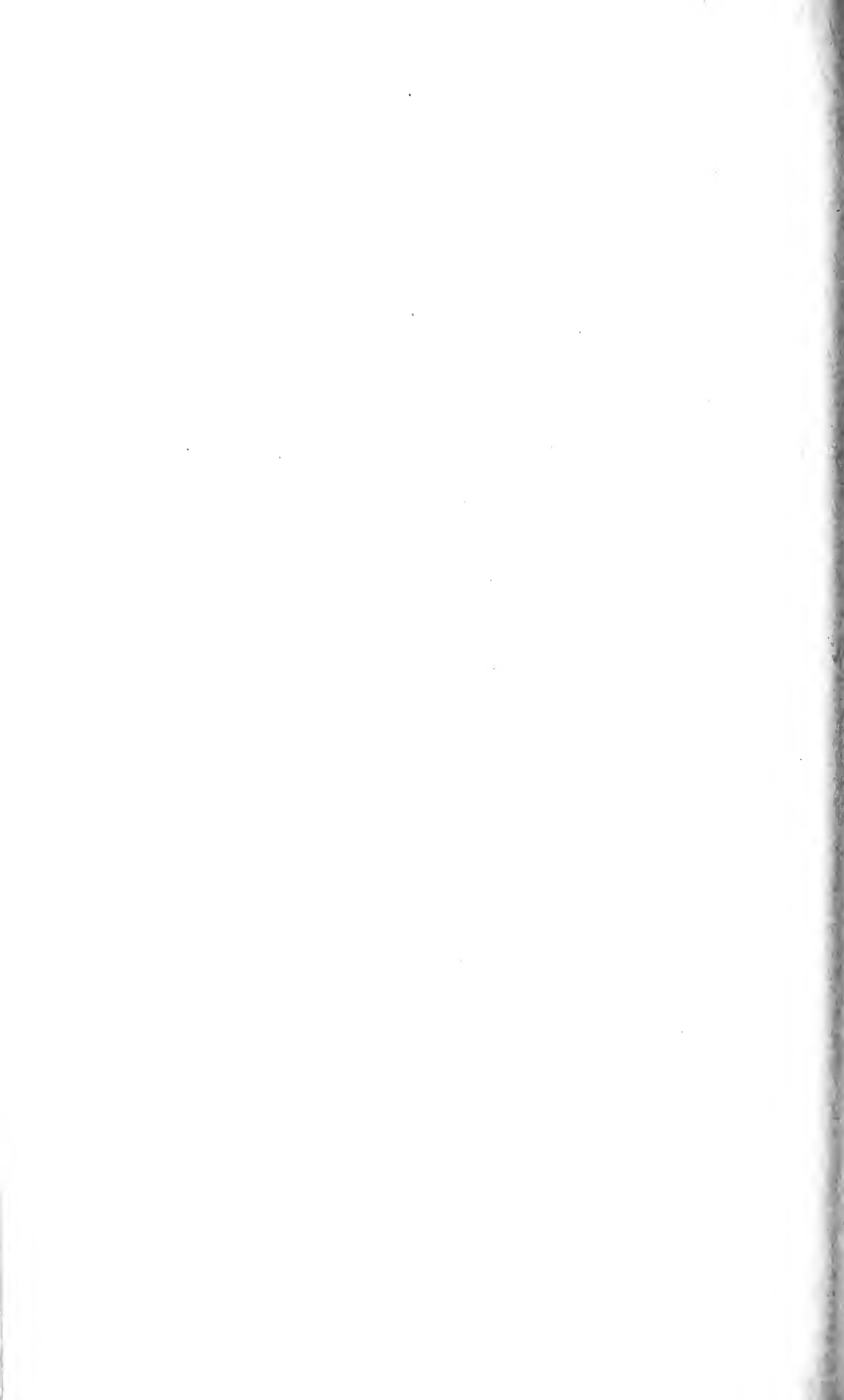
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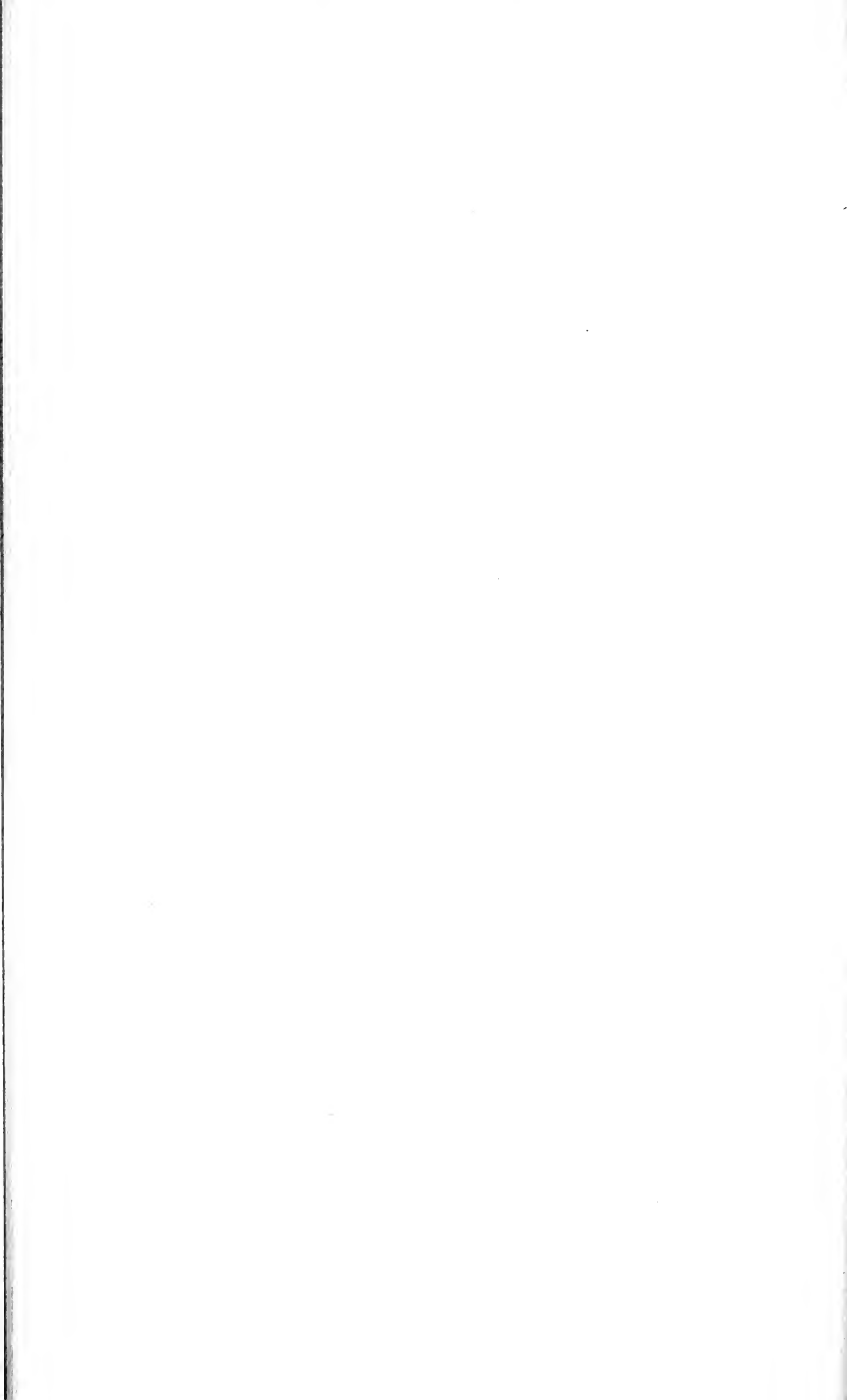
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NAMES AND ADDRESSES OF ATTORNEYS

Attorneys for Plaintiff:

DAVIS & RENFREW,

Anchorage,

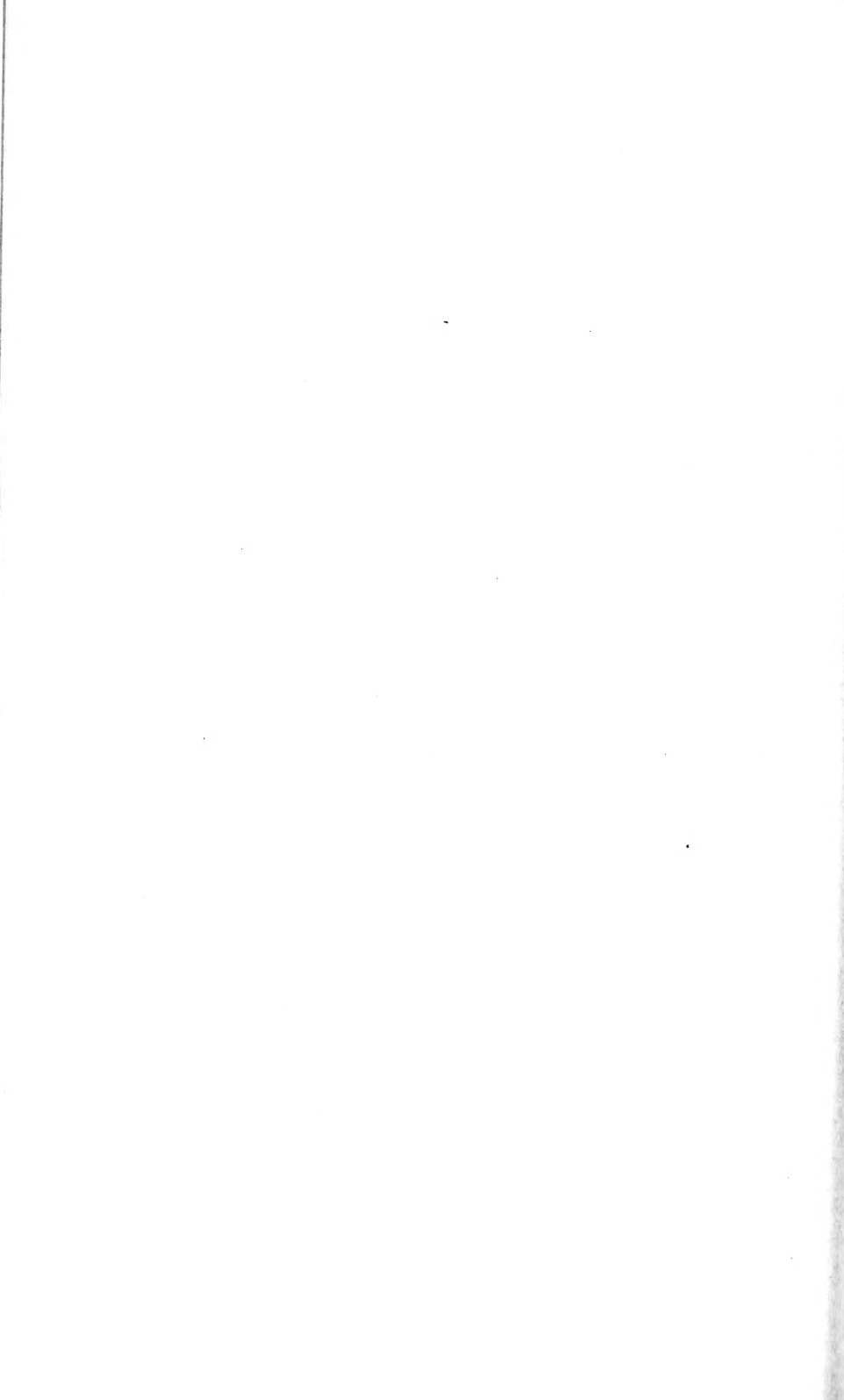
Alaska.

Attorneys for Defendant:

McCUTCHEON & NESBETT,

Anchorage,

Alaska.



In the District Court for the Territory of Alaska,  
Third Division

No. A-7223—Civil

ARTHUR W. STEPHENSON,

Plaintiff,

vs.

ALASKA AIRLINES, INC., a corporation,  
Defendant.

### COMPLAINT

Comes now the plaintiff in the above entitled action and for his cause of action against the defendant complains and alleges as follows, to-wit:

#### First Cause of Action

##### I.

That the Alaska Airlines, Inc., is a corporation duly organized, existing and operating under and by virtue of the laws of the Territory of Alaska, with its principal place of business at Anchorage, Alaska.

##### II.

That the plaintiff did at the instance and request of the defendant, on or about the 22nd day of September, 1950, enter into the defendant's employment at the agreed and stipulated wage of \$1300.00 per month plus expenses away from home and certain additional payments to be made by the defendant to cover the expenses incurred by plaintiff in moving his home from Redondo Beach, California, to either

Seattle, Washington, or Anchorage, Alaska, subject to the direction of the defendant through its chairman of board of directors R. W. Marshall.

### III.

That the plaintiff, prior to his employment by the defendant, was an employee of the Western Air Lines, Inc., and had thus been employed for a period of 23 years as a pilot and in other capacities and had, during such period, built up certain longevity rights in regard to pay and tenure. That at the time of entering the employment of the defendant, this plaintiff took a six months leave from Western Air Lines, Inc., at the expiration of which time this plaintiff could either return to the employment of the Western Air Lines, Inc., or sever his relations therewith and lose such rights as he had with Western Air Lines, Inc., by reason of longevity and tenure, all of which was known to the defendant corporation at the time of employment of this plaintiff.

### IV.

That March 18, 1951, was the end of the period within which this plaintiff could return to Western Air Lines, Inc. and retain his status as to pay and tenure with said company, and that prior to the said date of March 18, 1951, the defendant induced this plaintiff to sever his connections with the Western Air Lines, Inc. and did through its chairman of board of directors, R. W. Marshall promise this plaintiff a contract with the Alaska Airlines, Inc. for a period of not less than two years from March

15, 1951 to March 15, 1953, at a monthly salary of \$1300.00 plus expenses while away from home and did further promise to increase said basic pay upon the completion of the certification of the Alaska Airlines, Inc. as an air carrier between the Territory of Alaska and the continental United States.

V.

That at the request and instance of the defendant through its chairman of board of directors R. W. Marshall, this plaintiff did sever his connection with the Western Air Lines, Inc. and remain in the employment of the Alaska Airlines, Inc. as vice-president of the defendant corporation at the salary of \$1300.00 per month plus expenses away from home, until the receipt of a letter of dismissal received by this plaintiff on September 15, 1951, wherein the defendant dismissed the plaintiff from its employment and refused to pay the salary at the stipulated wage above mentioned.

VI.

That the plaintiff has at all times herein complained and still does, hold himself ready, willing and able to perform his services of employment to the defendant corporation, all of which services of employment are refused by said corporation.

VII.

That by reason of the defendant's failure to complete its contract of employment for the term and period of not less than two years from March 15, 1951, to March 15, 1953, this plaintiff has been dam-

aged in the amount of \$22,100.00, all without fault or responsibility on the part of this plaintiff.

## Second Cause of Action

### I.

For plaintiff's second cause of action, plaintiff adopts by reference and re-alleges the allegations set forth in paragraphs I and II of plaintiff's first cause of action herein to the same extent and purpose as though fully set forth herein.

### II.

That prior to the plaintiff's dismissal from the services of the defendant corporation on the 15th day of September, 1951, this plaintiff had certain credits due and owing him by way of salary and expenses pursuant to the terms of employment entered into between the plaintiff and the defendant as follows:

Travel expenses, February 11, 1951 to August 4, 1951, \$218.36.

Expenses for moving and additional costs incurred at the request of the chairman of the board of directors of the defendant corporation, \$179.31.

Wages accrued and not paid to October 15, 1951, \$2695.20.

Total amount \$3092.87, all of which sums are now due and owing from the defendant to this plaintiff, no part of which has been paid.

### III.

The plaintiff has been compelled to engage attorneys to prosecute the above and foregoing two



causes of action against the defendant, the reasonable value of which services is the amount of \$5000.00.

Wherefore, this plaintiff prays for judgment as follows:

1. For judgment against the defendant on plaintiff's first cause of action in the sum of \$22,100.00.
2. For judgment against the defendant on plaintiff's second cause of action in the sum of \$3092.87.
3. For plaintiff's attorneys fees in the sum of \$5000.00.
4. For plaintiff's costs of suit in this action incurred.
5. For such other and further relief as to the Court may seem meet and proper in the premises.

DAVIS & RENFREW,  
Attorneys for Plaintiff,

/s/ By JOHN C. HUGHES

[Printer's Note: The amounts printed are the corrected figures.]

Duly Verified.

Demand is hereby made by plaintiff in the above entitled action for a trial by jury.

DAVIS & RENFREW,  
Attorneys for Plaintiff,

/s/ By JOHN C. HUGHES

[Endorsed]: Filed Sept. 27, 1951.

[Title of District Court and Cause.]

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Davis & Renfrew, plaintiff's attorney, whose address is Box 477, Loussac-Sogn Bldg., Anchorage, Alaska, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal]

M. E. S. BRUNELLE,

Clerk of the District Court

/s/ By CLARA RHODES,

Deputy Clerk.

Dated: September 27, 1951.

Affidavit of Service attached.

[Endorsed]: Filed Sept. 28, 1951.

In the District Court for the Territory of Alaska.  
Third Division

[Title of Cause.]

MINUTE ORDER

Order Extending Time Within Which to  
File Answer

Now at this time upon motion of Buell A. Nesbett, of counsel for defendant, John C. Hughes, of counsel for plaintiff, concurring.

It Is Ordered that time within which to file answer in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant, be, and is hereby, extended to and including November 1, 1951.

Entered in Journal No. G-25, page No. 199, Oct. 19, 1951.

[Title of District Court and Cause.]

## ANSWER

Defendant answers the complaint herein and says:

### First Cause of Action

#### I.

Admits the allegations contained in paragraph I.

#### II.

Admits that plaintiff entered defendant's employment on or about the 22nd day of September 1950; denies all other allegations contained in paragraph II and in that connection alleges that upon entering defendant's employment Raymond W. Marshall, Chairman of the Board of Directors of defendant corporation, agreed to pay to plaintiff a monthly salary of \$1000.00, plus any expenses incurred by plaintiff while traveling away from home on corporation business, plus an additional sum of \$300.00 per month, said additional monthly payment of \$300.00 to continue only during the period plaintiff was required to maintain a family home in California while living in Alaska, said additional monthly payment to discontinue immediately after plaintiff had removed his family from California to a home in Alaska.

#### III.

Defendant is informed and believes and therefore admits that plaintiff was employed by Western Air Lines, Inc., prior to his employment by Alaska Airlines as alleged in paragraph III, and for lack of

information sufficient to form a belief, denies all the other allegations contained in said paragraph.

#### IV.

Denies all the allegations contained in paragraph IV and in this connection alleges that during the period of his employment by defendant, plaintiff on his own initiative on two separate occasions traveled from Anchorage, Alaska to New York City, on which said occasions plaintiff interviewed Raymond W. Marshall, Chairman of the Board of Directors of defendant corporation, requesting that defendant corporation enter into a contract of employment with plaintiff; that on each of said occasions plaintiff was denied a contract of employment and has never been employed by defendant under any arrangement other than that mentioned in paragraph II of this answer.

#### V.

Denies all of the allegations contained in paragraph V save and except the allegation that plaintiff received a letter of dismissal on September 15, 1951, which defendant admits, but in that connection alleges that notwithstanding the said letter of dismissal dated September 15, 1951, plaintiff was continued on the payroll of defendant corporation and regularly paid his agreed salary until October 15, 1951.

#### VI.

Denies all of the allegations contained in paragraph VI save and except the allegation that plaintiff's services of employment were refused by de-

defendant corporation, and in that connection alleges that plaintiff's services of employment have been refused by defendant corporation only since September 15th, 1951, although plaintiff was continued on defendant's payroll until October 15, 1951.

## VII.

Denies all of the allegations contained in paragraph VII.

### Second Cause of Action

#### I.

Realleges all of the allegations contained in paragraph I and II of the answer to plaintiff's first cause of action.

#### II.

Denies all of the allegations contained in paragraph II and alleges that the correct and proper accounting between plaintiff and defendant in connection with expenses, salary, and traveling expenses is that set out in defendant's counter-claim herein.

#### III.

Denies all the allegations contained in paragraph III.

As an affirmative defense to plaintiff's first and second causes of action, defendant says:

#### I.

That the alleged agreement mentioned in paragraph IV of plaintiff's first cause of action and by which this defendant is sought to be charged, was

and is by its terms not to be performed within one year from the making thereof and said alleged agreement was never in any writing subscribed by the defendant or by any of its officers or agents, and that there is not now nor was there ever any notes or memorandum thereon subscribed by defendant, its officers or agents.

### Counterclaim

By way of counterclaim defendant says:

#### I.

That it is a corporation organized under the laws of the Territory of Alaska, that it has filed its annual report for 1950, paid its annual corporation tax last due, and is qualified by law to prosecute this counterclaim.

#### II.

That during the period between September 22, 1950 and September 1, 1951, while employed as an officer of defendant corporation, plaintiff wrongfully withdrew and caused to be withdrawn from the treasury of defendant corporation various sums in excess of his agreed salary and authorized expenses in the total amount of \$2,174.15, which amount was paid to plaintiff by defendant in error and without authority and is now due and owing from plaintiff to defendant.

#### III.

Defendant has demanded that plaintiff repay to defendant said excessive and erroneous overpay-

ments, but defendant has failed and neglected to do so.

Wherefore defendant prays for judgment as follows:

1. Dismissal of plaintiff's first and second causes of action.
2. Judgment against plaintiff in favor of defendant on its counterclaim in the sum of \$6,524.33.
3. For defendant's costs and disbursements and a reasonable attorneys' fee.

McCUTCHEON & NESBETT,  
Attorneys for Defendant

/s/ By BUELL A. NESBETT

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 30, 1951.

---

[Title of District Court and Cause.]

## REPLY

Comes now the plaintiff, and in reply to defendant's counter-claim, admits, denies and alleges as follows:

### I.

The plaintiff has no knowledge sufficient to form a belief, and therefore, denies each and every allegation contained in paragraph one of defendant's counter-claim.



II.

The plaintiff admits that at or about the period mentioned in paragraph two of defendant's counterclaim, plaintiff was employed as an officer of the defendant corporation, but plaintiff denies each and every other allegation contained in paragraph two.

III.

Plaintiff denies each and every allegation contained in paragraph three of defendant's counterclaim, and plaintiff further alleges that he has at all times herein mentioned been willing to account to the defendants for any sums of money by him drawn or expended.

Wherefore, having fully answered defendant's counterclaim, plaintiff prays that the defendant take nothing thereby, and the plaintiff have and recover of and from this defendant, the relief demanded in plaintiff's complaint.

DAVIS & RENFREW,

Attorneys for the Plaintiff

/s/ By JOHN C. HUGHES,

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 27, 1951.

[Title of District Court and Cause.]

### MOTION FOR SUMMARY JUDGMENT

The defendant, Alaska Airlines, Inc., a corporation, by its attorneys, McCutcheon & Nesbett, hereby moves the Court to enter summary judgment for the defendant on the first cause of action asserted in the complaint in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the ground that the pleading and affidavit attached hereto show that the defendant is entitled to judgment as a matter of law.

McCUTCHEON & NESBETT,  
Attorneys for Defendant,

/s/ By JOHN L. RADER

State of New York,

County of New York—ss.

R. W. Marshall, being duly sworn, deposes and says:

I am Chairman of the Board of Directors of Alaska Airlines, Inc., and I am personally familiar with the facts in this action.

This affidavit is submitted in support of defendant's motion, under Rule 56 of the Rules of Civil Practice, for summary judgment dismissing the first cause of action asserted in the complaint herein upon the ground that said cause of action is without merit and void under the provisions of Sec. 58-2-2

of the Alaska Compiled Laws of 1949 for the reason that the alleged agreement pleaded therein "by its terms is not to be performed within a year from the making thereof", and that there is no note or memorandum thereof in writing expressing the consideration and subscribed by the party to be charged or by its lawfully authorized agent.

In paragraph IV of the complaint herein, it is alleged that defendant did through the Chairman of its Board of Directors, R. W. Mrashall, "promise this plaintiff a contract with Alaska Airlines, Inc. for a period of not less than two years from March 15th, 1951 to March 15th, 1953, at a monthly salary of \$1300, plus expenses, etc."

I emphatically deny that I made any such agreement as alleged by the plaintiff. I further deny that any other officer of Alaska Airlines made such an agreement with plaintiff, or that any other officer of Alaska Airlines was authorized to make such an agreement with plaintiff. Plaintiff was on a month to month basis only.

I further deny that the agreement alleged by plaintiff, or some note or memorandum thereof expressing the consideration, was in writing and subscribed by the party to be charged, Alaska Airlines, Inc., or by its lawfully authorized agent, as required by Sec. 58-2-2 of the Alaska Compiled Laws.

Wherefore, it is respectfully requested that defendant's motion for summary judgment directed

against the first cause of action asserted in the complaint herein, be granted.

/s/ R. W. MARSHALL

Sworn to before me this 31st day of January, 1952.

[Seal] /s/ HANS G. HACHMANN,  
Notary Public for the State of New York. Commission expires March 30, 1953.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 13, 1952.

---

In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

#### MINUTE ORDER RE ATTORNEY

Now at this time on oral motion of Buell A. Nesbett, permission is granted to Harold Harper and Gerald J. McMahon of the District Court, Southern District of New York upon each filing a certificate of good standing in the highest Court of the said state, for the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant.

Entered Journal No. G-26, page No. 303, March 11, 1952.

In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

MINUTE ORDER

Trial by Jury

Now on this 11th day of March, 1952, came the Plaintiff, Arthur W. Stephenson, and with John Hughes, of his counsel, the defendant Alaska Airlines, Inc., appearing by and through Buell Nesbett, of its counsel, and both sides announcing themselves as ready for trial in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant, the following proceedings were had, to-wit:

The Clerk, under the direction of the Court, proceeded to draw from the Trial Jury Box, one at a time, the names of the members of the regular panel of Petit Jurors and respective counsel examined and exercised their challenges against said Jurors, so drawn, until both sides were satisfied and the Jury complete, consisting of the following named persons, to-wit:

1. Mrs. Ken Laughlin; 2. Winfred W. Stewart; 3. Daniel H. Cruz; 4. Toiva Uutela; 5. Kathryn Gill; 6. Fred Nelson; 7. Bertha Perrine; 8. Leonard M. Johnson; 9. Delbert W. Hosler; 10. Barbara J. Lydick; 11. E. F. Eittner; 12. Calvin R. Cantrell.

Upon stipulation of respective counsel two alternate jurors were drawn, to-wit: 1. Ellen Curtiss and 2. Myra L. Duntaman, which said jury was duly sworn by the Clerk to well and truly try the matters

at issue in the above-entitled cause and a true verdict render in accordance with the evidence and the instructions given by the Court.

At this time the Court excused the members of the regular panel of Petit Jurors, not engaged in the trial of this cause, to report at 10:00 o'clock a.m., of Wednesday, March 12, 1952.

At 4:40 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m. of Wednesday, March 12, 1952.

Entered Journal G-26, page No. 304, March 11, 1952.

---

[Title of District Court and Cause.]

### SUBPOENA DUCES TECUM

The President of the United States of America,  
Greeting:  
To R. W. Marshall:

You Are Hereby Required, That all and singular business and excuses being set aside, you appear and attend before the District Court, Territory of Alaska, Third Division, to be held in the Court Room of said court at Anchorage, in the Territory of Alaska, on the 12th day of March, A.D., 1952, at 2 o'clock p.m., then and there to testify in the above-entitled cause, now pending in said Court, on the part of the plaintiff, and you are not to depart the Court without leave of the Court, and you are further required to bring with you a true and cor-

rect copy of the minutes and proceedings of the Board of Directors and the Executive Committee meetings of Alaska Airlines, Inc. for the period from September 1, 1950 to October 15, 1951, insofar as said minutes or records of the minutes and proceedings of either of said groups touch or concern the employment of Arthur W. Stephenson during said period and likewise the letters, memos and communications of Alaska Airlines, Inc. covering the same period touching and concerning the employment of Arthur W. Stephenson. And for failure to attend, as above required, you will be deemed guilty of contempt of Court, and liable to pay the party aggrieved all loss and damage sustained thereby.

Witness, The Honorable Anthony J. Dimond, Judge of the said District Court, Territory of Alaska, Third Division, and the seal of the said Court affixed this 12th day of March, in the year of our Lord one thousand nine hundred and fifty-two and of the Independence of the United States the one hundred and seventy-six.

[Seal]                    M. E. S. BRUNELLE,  
Clerk of the District Court, Territory of Alaska,  
Third Division

/s/ By CLARA RHODES,  
Deputy Clerk.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY AFFIDAVIT IN OP-  
POSITION TO MOTION FOR SUMMARY  
JUDGMENT

United States of America,  
Territory of Alaska—ss.

Arthur W. Stephenson, being first duly sworn, upon his oath deposes and says:

That the plaintiff has been for more than twenty years last past preceding the 22nd day of September, 1950, a pilot either in the service of the United States of America or in the service of an air carrier transporting mail, passengers and cargo in interstate commerce; that on and before the 22nd day of September, 1950, your affiant was employed by the Western Air Lines, Inc. as a senior air pilot and had, by virtue of his service with said company accumulated valuable rights and privileges, as is more particularly set forth in the agreement between Western Air Lines, Inc. and the air line pilots in the service of the Western Air Lines as represented by the Air Line Pilots Association International.

That on or about the 15th day of September, 1950, your affiant was introduced to R. W. Marshall of the Alaska Airlines, Inc. by Mr. Moe Howard of Alvin P. Adams Associates and at which time your affiant was informed by Mr. R. W. Marshall of Alaska Airlines, Inc. that the said corporation was negotiating for a certificated operation as an



air carrier between the Territory of Alaska and continental United States and that the said company was in need of a competent person to manage the activities of the company; that your affiant was, on or after September 15th and prior to September 22, 1950, requested by R. W. Marshall to take charge of the affairs of the Alaska Airlines, Inc. as general manager and vice-president, at which time R. W. Marshall was advised of the seniority of your affiant with the Western Air Lines, Inc. and advised that your affiant could possibly secure a six months leave of absence without loss of seniority and that within the six months period definite arrangements would have to be made in regard to a contract of employment if your affiant was to stay on after that period.

That pursuant to the agreements and arrangements with R. W. Marshall above mentioned your affiant requested and secured from Western Air Lines, Inc. a leave of absence of 180 days beginning September 18, 1950 through March 17, 1951, which leave of absence was subject to the terms of the agreement between Western Air Lines, Inc. and the pilots in the service of Western Air Lines, Inc.

That under date of September 22, 1950, R. W. Marshall issued a memorandum to Mr. Stephen J. McCutcheon, president of Alaska Airlines, Inc. advising Mr. McCutcheon that Mr. Stephenson, the plaintiff herein, had been chosen vice-president and general manager of the company as of that day, to make his headquarters at Anchorage and to take charge of the company's operations there.

That your affiant remained in the employment of Alaska Airlines, Inc. with the understanding that during the six months period a contract would be entered into between your affiant and the Alaska Airlines, Inc. whereby your affiant was to remain in said employment for a period of not less than two years at a salary of not less than \$1300.00 per month plus expenses while away from home plus certain allowances for moving expenses when a definite headquarters had been established for the situs of your affiant's direction of operations.

That your affiant and R. W. Marshall had definitely agreed that such a contract would be entered into prior to the expiration of affiant's leave of absence from Western Air Lines, Inc. which leave of absence, on the close of March 17, 1951 as above mentioned. That the execution of said contract was delayed by reason of R. W. Marshall's insistence and representations that it would be taken care of at a later date and that all would be well.

That on or about the 15th day of March, 1951, your affiant made a special trip to Washington, D. C., for the purpose of definitely determining his position in regard to said contract prior to the expiration of his leave of absence above mentioned; that your affiant well remembers that there was barely enough time to return to Los Angeles and report to work on the 18th day of March, 1951, when your affiant had a conference with R. W. Marshall and submitted a memorandum of the agreement substantially as is herein recited with

provisions for an increase under certain circumstances, and your affiant asked R. W. Marshall in effect what shall I do, I want to know my position, either I stay with the company under a contract or I return to Western and time is short. Mr. Marshall replied we want you to stay with the company, we have a place for you and as soon as the certificate is granted and we know what our operations will be we will execute a contract of employment for you; that R. W. Marshall at the time and place above mentioned well knew and was advised by your affiant that the matter was of supreme importance to him because of the expiration of the leave of absence above mentioned would cancel the accrued seniority rights of your affiant with Western Air Lines, Inc. and in which event your affiant would have to commence employment as a cub pilot and even that possibility was foreclosed because your affiant was then past the age which was allowed for cub pilots; that your affiant does not state that he so advised R. W. Marshall in the exact words above mentioned but that the knowledge and context thereof was conveyed in the conversation with R. W. Marshall of Alaska Airlines, Inc. at or about the time mentioned.

That your affiant upon the representations of R. W. Marshall that a contract would be executed for not less than two years and for not less than the salary hereinabove mentioned did in fact sever his relationships with Western Airlines by a communication either by wire or telephone to the effect that he would not return to Western Air Lines and

would thereby lose all of his accrued rights of seniority with the Western Air Lines and irrevocably foreclosed himself of the valuable tenure of employment with said company, all at the request and insistence of R. W. Marshall for and on behalf of Alaska Airlines, Inc.

Further affiant saith not.

/s/ ARTHUR W. STEPHENSON

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] /s/ RETA OSBORN,  
Notary Public for Alaska. My commission expires  
7-25-55.

[Endorsed]: Filed March 12, 1952.

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In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

### MINUTE ORDER

#### Hearing on Defendant Motion for Summary Judgment

Now at this time hearing on defendant motion for summary judgment in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant, came on regularly before the Court, John C. Hughes, appearing for and in behalf of the plaintiff and Buell Nesbett appearing for and in behalf of the de-

fendant. The following proceedings were had, to-wit:

Argument to the Court was had by Buell Nesbett, for and in behalf of the defendant.

Argument to the Court was had by John C. Hughes, for and in behalf of the plaintiff.

Argument to the Court was had by Buell Nesbett, for and in behalf of the defendant.

Whereupon the Court having heard the argument of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision.

Entered Journal No. G-26, page No. 308, March 12, 1952.

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In the District Court for the Territory of Alaska,  
Third Division  
[Title of Cause.]

### MINUTE ORDER

#### Denying Defendant's Motion For Summary Judgment

Now at this time the Court denied defendant's motion for summary Judgment in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, and motion denied without prejudice.

Entered Journal No. G-26, page No. 310, March 12, 1952.

In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

### MINUTE ORDERS

#### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Opening statement to the Jury was had by John C. Hughes, for and in behalf of the plaintiff.

Opening statement to the Jury was had by Buell Nesbett, for and in behalf of the defendant.

At this time all witnesses were excluded from the Courtroom.

Arthur W. Stephenson, being first duly sworn, testified for and in behalf of the plaintiff.

An agreement, blank day of April 1951, was duly offered, marked and admitted as plaintiff's exhibit 1.

A withholding statement, 1951, was duly offered, marked and admitted as plaintiff's exhibit 2.

An Interoffice correspondence dated September 22, 1950 was duly offered, marked and admitted as plaintiff's exhibit 3.

An agreement as amended to January 1, 1949 was duly offered, marked and admitted as plaintiff's exhibit 4.

A Notice of Appointment dated September 22, 1950 was duly offered, marked and admitted as plaintiff's exhibit 5.

At 4:30 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Thursday, March 13, 1952.

Entered Journal No. G-26, page No. 310, March 12, 1952.

### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answer to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Arthur W. Stephenson, heretofore duly sworn, resumed stand for testimony for and in behalf of the plaintiff.

An analysis of account dated 9/11/51 was duly offered, marked and admitted as plaintiff's exhibit 6.

Memorandum dated January 5, 1951 was duly offered, marked and admitted as plaintiff's exhibit 7.

A statement of account, dated April 30, 1951, was duly offered, marked and admitted as plaintiff's exhibit 8.

Three statements of account for May, June and July, 1951, were duly offered, marked and admitted as plaintiff's exhibit 9.

Recapitulation of expense account was duly of-

ferred, marked and admitted as plaintiff's exhibit 10.

A collect of paid bills was duly offered, marked and admitted as plaintiff's exhibit 11.

A group of cancelled checks was duly offered, marked and admitted as plaintiff's exhibit 12.

At 12:01 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Entered Journal No. G-26, page No. 317, March 13, 1952.

#### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Arthur W. Stephenson, heretofore duly sworn, resumed stand for testimony for and in behalf of the plaintiff.

A group of checks was duly offered, marked and admitted as plaintiff's exhibit 13.

An invoice dated 8/31/51 was duly offered, marked and admitted as plaintiff's exhibit 14.

Moving and additional expense dated March 12, 1952, was duly offered, marked and admitted as plaintiff's exhibit 15.

Jury excused.

At this time Buell Nesbett, for and in behalf of the defendant, moves the Court for instructed verdict on behalf of the defendant.



Argument to the Court was had by Buell Nesbett, for and in behalf of the defendant.

Argument to the Court was had by John C. Hughes, for and in behalf of the plaintiff.

Motion of defendant denied.

Twenty vouchers were duly offered, marked and admitted as defendant's exhibit "A" for identification.

A copy of letter dated 9/13/51 was duly offered, marked and admitted as defendant's exhibit "B".

At 4:40 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Friday, March 14, 1952.

Entered Journal No. G-26, page No. 317, March 13, 1952.

### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Albert W. Stephenson, heretofore duly sworn, resumed stand for and in behalf of the plaintiff.

A letter dated October 15, 1951, was duly offered, marked and admitted as defendant's exhibit "C".

A letter dated September 20, 1951 was duly offered, marked and admitted as plaintiff's exhibit 16.

At 12:01 o'clock p.m. Court duly admonished the

Trial Jury and continued cause to 2:00 o'clock p.m.

Entered Journal No. G-26, page No. 319, March 14, 1952.

### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Arthur W. Stephenson, heretofore duly sworn, resumed witness stand for and in behalf of the plaintiff.

The plaintiff rests.

T. W. Baruth, being first duly sworn, testified for and in behalf of the defendant.

Twenty expense vouchers and supporting papers were duly offered, marked and admitted as defendant's exhibit "A".

A summary analysis was duly offered, marked and admitted as defendant's exhibit "D".

An auditor analysis was duly offered, marked and admitted as defendant's exhibit "E".

At 4:55 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Monday, March 17, 1952.

Entered Journal No. G-26, page No. 320, March 14, 1952.

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

William Baruth, heretofore duly sworn, resumed stand for and in behalf of the defendant.

A Recapitulation of Accounts was duly offered, marked and admitted as defendant's exhibit "F".

Schedules of Meals was duly offered, marked and admitted as defendant's exhibit "G".

An account of chargebacks was duly offered, marked and admitted as defendant's exhibit "H".

At 12:01 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Entered Journal No. G-26, page No. 325, March 17, 1952.

Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

William Baruth, heretofore duly sworn, resumed witness stand for and in behalf of the defendant.

Raymond W. Marshall, being first duly sworn, testified for and in behalf of the defendant.

Charles J. McMahan, being first duly sworn, testified for and in behalf of the defendant.

At 5:00 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Tuesday, March 18, 1952.

Entered Journal No. G-26, page No. 326, March 17, 1952.

### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

The defendant rests.

Arthur W. Stephenson, heretofore duly sworn, resumed witness stand in rebuttal for and in behalf of the plaintiff.

A letter dated April 17, 1951 was duly offered, marked and admitted as plaintiff's exhibit 17.

A list of traveling expenses was duly offered, marked and admitted as plaintiff's exhibit 18.

The plaintiff rests.

William Baruth, heretofore duly sworn, resumed the witness stand in surrebuttal for and in behalf of defendant.

A final summary of A. W. Stephenson Account

was duly offered, marked and admitted as defendant's exhibit "I".

At this time both sides granted leave to amend complaint and affirmative defense to conform with testimony.

The defendant rests.

The plaintiff rests.

At 11:45 o'clock a.m. Court duly admonished the Trial Jury and continued cause to 2:00 o'clock p.m.

Entered Journal No. G-26, page No. 330, March 18, 1952.

### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Opening argument to the Jury was had by John C. Hughes, for and in behalf of the plaintiff.

Argument to the Jury was had by Buell Nesbett, for and in behalf of the defendant.

At 4:55 o'clock p.m. Court duly admonished the Trial Jury and continued cause to 10:00 o'clock a.m. of Wednesday, March 19, 1952.

Entered Journal No. G-26, page No. 331, March 18, 1952.

[Title of District Court and Cause.]

### AFFIRMATIVE DEFENSE

If a two year employment contract at a monthly salary of \$1300.00 was entered into on or about March 16, 1951, between the plaintiff, Arthur W. Stephenson, and the defendant Alaska Airlines, Inc. the plaintiff wrongfully violated the terms of said contract by failing to account for corporate funds advanced to and drawn by him, and by refusing and failing to submit expense reports for the period from February 11, 1951 to and including August 1951, although duly requested to do so by the Accounting Office of the defendant, and consequently the defendant was justified and authorized to discharge the plaintiff for violation of his contract of employment.

The plaintiff, Arthur W. Stephenson failed and refused to fulfill the duty imposed upon him by law to seek other similar employment with due diligence in order to mitigate or lessen the damages claimed to have been suffered by him.

[Endorsed]: Filed March 18, 1952.

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[Title of District Court and Cause.]

### DEFENDANTS REQUESTED INSTRUCTIONS

1. The important issue in this case is whether Mr. Marshall and Mr. Stephenson reached an agreement at their meeting in New York on or about March 16, 17, 1951, as to the terms of a contract of

employment. In order for you to find that a contract of employment was made at that time, you must find that both Mr. Marshall and Mr. Stephenson agreed as to the amount of salary Mr. Stephenson was to receive and the length of time Mr. Stephenson was to be employed. If you find that Mr. Marshall did not agree as to the salary Mr. Stephenson was to receive, or as to the length of the contract, you must find that there was no contract of employment and you must bring in a verdict for the defendant on plaintiff's first cause of action for damages for breach of contract.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

2. If you find that Mr. Marshall did not agree with Mr. Stephenson at the meeting in New York on or about March 16, 17, 1951, as to Mr. Stephenson's salary and the period of his employment, and that Mr. Marshall suggested that the decision on these questions be postponed until after Alaska Airlines received a certificate to operate to Seattle, I instruct you to bring in a verdict for the defendant on the plaintiff's first cause of action for damages for breach of an employment contract.

If you find that Alaska Airlines had in force a policy requiring its employees to submit periodic expense reports supported by receipts showing expenses incurred on behalf of the company, wherever possible, in order to account for corporate funds advanced for expenses, and if you find that substantial sums of company money were advanced to Mr.

Stephenson for expenses and that although duly requested to do so by the accounting office of Alaska Airlines, Mr. Stephenson failed and refused to submit his expense statements without good cause and sufficient cause for an unreasonable period of time, then I instruct you that to find that Mr. Stephenson had violated his contract in a substantial manner, and that this violation of company policy was sufficient grounds to justify the discharge of Mr. Stephenson.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

3. An agreement to make an agreement in the future is not a contract. If you find that on March 16 or 17, 1951, Mr. Marshall promised Mr. Stephenson that in the future, upon the issuance of a certificate by the C.A.B. for the Seattle service, Mr. Marshall would negotiate with Mr. Stephenson for a written employment contract with salary, length of employment and other terms then to be agreed upon, your verdict must be for the defendant on the first cause of action.

Plaintiff, Mr. Stephenson claims that on March 16 or 17, 1951, Mr. Marshall made an oral contract with him for two years' employment at \$1300 per month, the salary to be increased when the C.A.B. should issue a certificate for the Seattle service. In determining whether or not the parties made such a contract on March 16 or 17, you may take into consideration the fact that, in less than a month, between April 7 and 11, 1951, and before the issu-



ance of a certificate by the C.A.B., Mr. Stephenson submitted a proposed written contract prepared by him providing for four years employment at a salary of \$1500 per month.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

4. Even if you find that Mr. Marshall on March 16 or 17, 1951, promised Mr. Stephenson to employ him for two years at a salary as claimed by him, you must nevertheless find a verdict for defendant if you do not also find that Mr. Stephenson at the same time promised to work for defendant for a period of two years and for such salary.

Refused except as covered by instructions given. Exceptions taken. Anthony J. Dimond, District Judge.

5. If you find that Mr. Stephenson surrendered his employment with Western Air Lines, Inc., not in reliance upon Mr. Marshall's alleged promise to give him a written contract for two years' employment but for any other reason, such as a desire to give up flying and continue in an executive position, even though there was no certainty that he would retain that position for any specified length of time, your verdict must be for the defendant. In making this determination you may consider all the circumstances including the fact that Mr. Stephenson had reached the age of 51.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

6. If you should find that Mr. Stephenson and Mr. Marshall reached an agreement for Mr. Stephenson's employment during Mr. Stephenson's visit to New York on or about April 7 to April 11, 1951, and not until then, your verdict must be for the defendant.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

7. If you find that a definite employment contract had been made with Mr. Stephenson and that thereafter he was wrongfully discharged from his employment without sufficient cause, I instruct you that Mr. Stephenson was under a duty to make reasonable efforts to find other employment in order to lessen the damages which he claimed in the form of loss of salary. If you find that Mr. Stephenson did not make reasonable efforts to find other employment, I direct you to find that he is not entitled to recover a salary for the duration of the period during which he failed to make reasonable efforts to find other employment.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

8. If you find that Mr. Stephenson on or about March 18, 1951, gave up his job with Western Airlines because he was willing to gamble (take a chance on) on Mr. Marshall's suggestion that the negotiation of an employment contract be postponed until Alaska Airlines had received a certifi-

cate to operate to Seattle, and if you find that Mr. Stephenson did not give up his job with Western Airlines upon Mr. Marshall's promise of a two year contract at \$1300 per month, I direct you to bring in a verdict for the defendant on the first cause of action.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

Defendants Requested Instructions—Additional

1. Even if you believe that Mr. Marshall on or about March 16, 1951, persuaded Mr. Stephenson to stay on with Alaska Airlines, you must bring in a verdict for the defendant, Alaska Airlines on plaintiff's first cause of action based on a two year contract unless you also find that in addition to persuading Mr. Stephenson to stay on Mr. Marshall agreed to hire Mr. Stephenson for a two year period at a salary of \$1300.00 per month and Mr. Stephenson agreed to accept that arrangement.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

2. The cost of making payments for the purchase of a house, or the rental of a house, or the cost of the purchase of clothes for his family, or the hire of a car to locate an apartment, are not the kind of expenses which are ordinarily considered moving expenses and are not expenses which an employee can ordinarily charge to his employer. Before you can find that Mr. Stephenson is entitled to charge

such expenses against Alaska Airlines, you must first find that Mr. Stephenson and Mr. Marshall expressly agreed that such expenses would be paid by Alaska Airlines.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

[Endorsed]: Filed March 19, 1952.

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[Title of District Court and Cause.]

### INSTRUCTIONS REQUESTED BY PLAINTIFF

#### 1.

You are instructed that the measure of damages for the breach of contract of employment for a specific period is, without further showing to the contrary, the contract earnings subject to deductions for other earnings from other employment in which the employee engages after discharge and what the discharged employee might have earned by exercise of diligence during the unexpired term of employment.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

#### 2.

You are instructed that if you find that the plaintiff Arthur W. Stephenson did in fact have a contract of employment for a period of two years at the rate of \$1300.00 per month and that if you fur-

ther find that the defendant, through its officer Mr. Marshall, induced Mr. Stephenson by the promise of reducing said oral contract to writing, and that acting upon such representations Mr. Stephenson severed his connections with Western Air Lines on or about the 18th day of March, 1951, then in that event the measure of damages is properly the contract amount due Mr. Stephenson for the unexpired term of the employment minus other earnings and minus also what he might earn by exercise of diligence during the unexpired term.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

3.

You are instructed that the plaintiff in the proof of his case may take advantage of the proof of the defendant, so that if you find that the defendant has proved or alleged and the same has not been contradicted, that Mr. Stephenson was paid wages up to and including the 15th day of October, 1951, then in that event you may use the longer period of employment and consequential payment of wages in computing the wages due Mr. Stephenson either under his first or his second cause of action.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

4.

You are instructed that if the testimony of any witness has been proven wrong in any material respect, you may disregard the testimony of such wit-

ness except as to points corroborated by witnesses whose testimony has not been so affected by proof of material unreliability; in other words, a witness found false in one part of his testimony is not to be trusted in others.

Refused except as covered by instructions given. Exception taken. Anthony J. Dimond, District Judge.

DAVIS & RENFREW,  
Attorneys for Plaintiff

/s/ By JOHN C. HUGHES

[Endorsed]: Filed March 19, 1952.

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In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

### MINUTE ORDER

#### Trial by Jury Continued

Now came the Trial Jury, who on being called, each answered to his or her name, came the respective parties, came also the respective counsel as heretofore and the trial of cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines Inc., a corporation, Defendant, was resumed.

Argument to the Jury was had by John C. Hughes for and in behalf of the plaintiff.

Whereupon the Court read his instructions to the Trial Jury and Trial Jury was excused pending taking of exceptions to Instructions by Counsel.

Trial Jury recalled.

At this time George W. Parks was duly sworn by the Deputy Clerk as Bailiff in charge of said Jurors, and upon stipulation by and between respective counsel the Court directed that a sealed verdict be returned in this cause and at 11:40 o'clock a.m. the Trial Jury retired in charge of their sworn bailiff to deliberate upon their verdict and alternate Jurors were excused to report at 10 o'clock a.m. of Monday, March 24, 1952 in the Courtroom of the Federal Building.

Entered Journal No. G-26, page No. 339, March 19, 1952.

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[Title of District Court and Cause.]

## INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to ac-

cept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence. Preponderance of evidence means the greater weight of evidence, such evidence as, when weighed with the evidence which is offered to oppose it, has the greater convincing power in the minds of the jury. While the plaintiff is required to prove his case by the greater weight of the evidence, this does not require the plaintiff to prove any fact beyond reasonable doubt. A fact is sufficiently proved if the greater weight of the evidence is in its favor. If the weight of evidence, in your minds, is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

In this case the defendant asserts in its cross complaint that the plaintiff is indebted to the defendant in a substantial sum. The burden of proof



is upon the defendant to prove the material averments of its cross complaint by a fair preponderance of the evidence and if the defendant fails in this respect then you may not return a verdict in favor of the defendant and against the plaintiff for recovery of any sum.

In his first cause of action as stated in his complaint the plaintiff alleges that prior to entering into the employ of the defendant on or about September 22, 1950, the plaintiff for many years had been employed by the Western Airlines, Inc., and had built up certain longevity rights in regard to pay and tenure; at the time the plaintiff entered the employ of the defendant he secured a six-months leave of absence from Western Airlines, Inc., at the expiration of which time plaintiff could either return to the employment of Western Airlines, Inc., or sever his relations therewith and lose such rights as he had with Western Airlines, Inc., by reason of longevity and tenure, all of which was known to the defendant at the time of the employment of plaintiff; that shortly before March 18, 1951, the defendant induced plaintiff to sever his connection with the Western Airlines, Inc., and defendant did through its Chairman of the Board of Directors, R. W. Marshall, promise plaintiff a contract with the Alaska Airlines, Inc., for a period of not less than two years from March 15, 1951 to March 15, 1953, at a monthly salary of \$1300.00 plus expenses while away from home, and further promised to increase such basic pay upon the completion of the certification of the Alaska Airlines, Inc., as an air

carrier between the Territory of Alaska and the Continental United States; that at the request and instance of defendant acting through its Chairman of the Board of Directors, R. W. Marshall, plaintiff did sever his connection with Western Airlines, Inc., and did remain in the employ of the Alaska Airlines, Inc., as vice-president of the corporation at a salary of \$1300.00 per month plus expenses away from home, until the receipt of a letter of dismissal received by plaintiff on September 15, 1951, wherein the defendant dismissed the plaintiff from its employ and refused to pay the salary at the stipulated wage mentioned.

In his second cause of action the plaintiff alleges that at the instance and request of the defendant corporation the plaintiff did on or about the 22nd day of September, 1950, enter into the employ of the defendant at the agreed and stipulated wage of \$1300.00 per month, plus expenses away from home and certain additional payments to be made by the defendant to cover the expenses incurred by plaintiff in moving his home from Redondo Beach, California, to either Seattle, Washington or Anchorage, Alaska, subject to the direction of the defendant through the chairman of its Board of Directors, R. W. Marshall; that on September 15, 1951, the defendant dismissed plaintiff from defendant's employ and refused to pay all of the salary and expenses due the plaintiff according to the agreement between the plaintiff and the defendant; that prior to the plaintiff's dismissal from the service of the defendant corporation on Septem-

ber 15, 1951, the plaintiff had certain credits due and owing him by way of salary and expenses pursuant to the terms of his employment stated in plaintiff's complaint as follows:

|  |           |
|--|-----------|
| Travel expenses February 11, 1951 to<br>August 4, 1951 .....   | \$ 273.24 |
| Expenses for moving and additional<br>costs incurred at the request of the<br>Chairman of the Board of Direc-<br>tors of the defendant ..... | 792.48    |
| Wages accrued and not paid to Sep-<br>tember 15, 1951 .....  | 1,950.00  |

thus making a total amount then claimed by the plaintiff to be due him from the defendant of \$3,015.72.

During the course of the trial as a result of further calculations the plaintiff claimed that the true amounts due him from the defendant are as follows:

|   |            |
|---|------------|
| Travel expenses .....                                     | \$ 218.36  |
| Moving expenses .....                                     | 179.31     |
| Wages accrued and not paid to Octo-<br>ber 15, 1951 ..... | 2,695.20   |
|   | <hr/>      |
| Total .....   | \$3,092.87 |

The plaintiff now asserts that the sum of \$3,092.87 is due, owing and unpaid to him from the defendant.

The defendant in its answer to plaintiff's second cause of action alleges that no sum whatsoever is due and owing from the defendant to the plaintiff and defendant in its counter claim as pleaded alleges that during the period between September 22,

1950 and September 1, 1951, the plaintiff, while employed as an officer of the defendant corporation, wrongfully withdrew and caused to be withdrawn from the Treasury of the defendant corporation various sums in excess of his agreed salary and authorized expenses in the total amount of \$2,924.33, which amount, defendant alleges in its answer, was paid to plaintiff by defendant in error and without authority and is now due and owing from plaintiff to defendant; defendant further alleges that it has demanded that plaintiff repay to defendant such alleged excessive and erroneous over-payments but plaintiff has failed and neglected to make any repayment whatever.

At the conclusion of the trial a witness for the defendant presented a statement revising the account heretofore given of the account between plaintiff and defendant and testified that the plaintiff now owes defendant the sum of \$2,174.15. Accordingly, this is the sum with which we are now concerned as demanded by the defendant of the plaintiff, over and above all just credits and offsets to which the plaintiff may be entitled.

Accordingly, we find from the pleadings the plaintiff asserting that the defendant owes him on plaintiff's second cause of action the sum of \$3,092.87, while the defendant asserts that it not only does not owe the plaintiff anything whatever but that the plaintiff is indebted to the defendant in the sum of \$2,174.15.

After all of the evidence had been offered the defendant was permitted by the Court to amend its

answer by setting up two affirmative defenses to conform with what defendant asserted to be the proof in the case, and those affirmative defenses read as follows:

“Affirmative Defense

“If a two year employment contract at a monthly salary of \$1300.00 was entered into on or about March 16, 1951, between the plaintiff, Arthur W. Stephenson, and the defendant Alaska Airlines, Inc., the plaintiff wrongfully violated the terms of said contract by failing to account for corporate funds advanced to and drawn by him, and by refusing and failing to submit expense reports for the period from February 11, 1951, to and including August 1951, although duly requested to do so by the Accounting Office of the defendant, and consequently the defendant was justified and authorized to discharge the plaintiff for violation of his contract of employment.

“Affirmative Defense

“The plaintiff, Arthur W. Stephenson failed and refused to fulfill the duty imposed upon him by law to seek other similar employment with due diligence in order to mitigate or lessen the damages claimed to have been suffered by him.”

All of the averments contained in the defendant's answer and counter claim and the two affirmative defenses above quoted, are denied by the plaintiff.

You should remember that pleadings are not evidence and are not to be considered as evidence. Pleadings serve the purpose of putting before the jury or the Court the respective contentions and

claims of the plaintiff and of the defendant but such pleadings are not evidence of any fact or alleged fact stated therein.

The plaintiff's first cause of action is based upon an alleged oral agreement made shortly prior to March 18, 1951 between the plaintiff and the defendant corporation, the latter acting by and through the Chairman of its Board of Directors, R. W. Marshall, wherein and whereby plaintiff asserts that defendant employed him for the minimum period of two years at a minimum salary of \$1300.00 per month and promised to put the contract in writing at a later date when the defendant would be given its then hoped for and expected certificate of convenience and necessity to operate an airline between Alaska and the States.

The important issue in this case as to the first cause of action is whether the plaintiff and the defendant, the latter acting through R. W. Marshall, actually reached an agreement at their meeting in New York on or about March 15 to 17, 1951, as to the terms of a contract of employment. In order for you to find that a contract of employment was made at that time, you must find that both the plaintiff and Marshall agreed as to the minimum amount of salary the plaintiff was to receive and the minimum length of time, namely two years, that the plaintiff was to be employed. If you find that Marshall did not agree as to the minimum salary the plaintiff was to receive, or if he did not agree as to the minimum duration of the contract, you must find that there was no contract of employment, and in that event

you must bring in a verdict in favor of the defendant and against the plaintiff upon the plaintiff's first cause of action. If you find that Marshall did not agree with the plaintiff at the meeting in New York held on or about March 15 to 17, 1951, as to the plaintiff's salary or as to the period of his employment, and that Marshall postponed decision on these questions until after the defendant should receive a certificate to operate between Alaska and the States, then the plaintiff is not justly entitled to recover anything against the defendant upon the plaintiff's first cause of action.

An agreement to make an agreement in the future with the terms thereof not specified is not a contract at all. If you find that on or about March 15 to 17, 1951, Marshall promised the plaintiff only that in the future upon the issuance of a certificate to the defendant to operate an airline between Alaska and the States the defendant would negotiate with the plaintiff for a written employment contract with salary, length of employment and other terms then to be agreed upon, your verdict must be for the defendant on the first cause of action.

In determining whether or not a contract of employment was made on or about March 15 to 17, 1951, between the plaintiff and the defendant, the latter acting through R. W. Marshall, you may take into consideration all other facts and circumstances relating to negotiations between the plaintiff and the defendant concerning a contract or contracts in writing, or otherwise. Even if you find that on or

about the time mentioned Marshall promised the plaintiff to employ him in the service of the defendant corporation for two years at a salary as claimed by plaintiff, you must nevertheless find a verdict for the defendant on plaintiff's first cause of action unless you further find that the plaintiff at the same time promised to work for the defendant for the period of two years and for a minimum salary of \$1300.00 a month, which might be increased by agreement of the parties after the issuance of the desired certificate to the defendant.

If you find that the plaintiff surrendered his employment with Western Airlines, Inc., not upon the defendant's alleged agreement to employ the plaintiff for the minimum period of two years at a minimum compensation of \$1300.00 per month, but rather as a desire to give up flying and continue in an executive position even though there was no certainty that he would retain such position for any specified length of time, your verdict must be for the defendant. In making this determination you may consider all of the circumstances of the case, including the age of the plaintiff.

If you find that a definite employment contract was made in March, 1951, between the plaintiff and the defendant, and that thereafter the plaintiff was wrongfully discharged from his employment without sufficient cause, the plaintiff is under a duty to make reasonable efforts to find other employment in order to lessen the damages which he claims in the form of loss of compensation. If you find that the plaintiff did not make reasonable efforts to find



other employment, under the circumstances disclosed by the evidence given in the trial of the case, the plaintiff is not entitled to recover compensation for the period during which you find he has failed to make reasonable efforts to find other employment. In this connection you make take into consideration all of the circumstances relating to the subject, to determine whether or not the plaintiff, under the revealed circumstances, was justly obliged to seek other employment.

If you find that the plaintiff did in fact have a contract of employment for the period of at least two years at a minimum salary of \$1300 per month, and if you further find that the plaintiff was wrongfully discharged from his employment then and in that event the measure of the plaintiff's damages is properly the contract amount due the plaintiff for the unexpired term of the employment, minus such other earnings as he has received since his discharge and minus also what he may earn by the exercise of diligence during the unexpired term of his alleged contract. You will find by calculation that the plaintiff on his first cause of action now claims \$22,100.00. Dividing that amount by \$1300.00, which is plaintiff's claim as to his monthly salary, we find that \$22,100.00 would cover a period of 17 months.

When one is wrongfully discharged from employment it is his duty to seek other employment and he can not justly remain idle for the entire period of his contract of employment from which he was discharged and then recover from his for-

mer employer the entire amount which he would have earned had he continued in the employment. The employer is entitled to a credit of whatever the employee earns or might earn with reasonable diligence during the unexpired period of the contract of employment.

As to plaintiff's second cause of action, you have heard all of the evidence and it is for you to decide whether the defendant is indebted to the plaintiff in the amount claimed by plaintiff or in any other amount, or whether to the contrary the plaintiff is indebted to the defendant in the amount claimed by the defendant or in any other sum. It therefore becomes your duty to decide the terms of the agreement entered into between the plaintiff and defendant.

The plaintiff is entitled to all of the salary and expenses agreed to between the parties in the plaintiff's contract of employment, or thereafter agreed to by the defendant acting by and through the Chairman of its Board of Directors, R. W. Marshall, but no more. If you find that the plaintiff is entitled to any sum due and owing him from the defendant after all just counter claims and offsets, you should return a verdict in favor of the plaintiff and against the defendant for that amount. However, if you find that the defendant has paid to the plaintiff all that it justly owes him you should return a verdict in favor of the defendant and against the plaintiff. And if you find that the plaintiff is indebted to the defendant in any sum, you should

return a verdict in favor of the defendant and against the plaintiff for that amount.

Before you can find that the plaintiff is entitled to charge against the defendant the cost of making payments for the purchase of a home, or the rental of a dwelling house or the cost of purchase of clothes for his family, or the hire of a car to locate an apartment, you must find that the defendant agreed that such expenses would be paid by the defendant.

If you find that the defendant had in force a policy known to plaintiff requiring its employees, including the plaintiff, to submit periodic expense reports supported by receipts showing expenses incurred on behalf of the defendant whenever possible in order to account for corporate funds advanced for expenses, and if you find that substantial sums of money were advanced by defendant to the plaintiff for expenses and that although requested to do so by the defendant's accounting office, the plaintiff failed and refused to submit his expense statements without good and sufficient cause and for an unreasonable period of time, then you may find that plaintiff thereby violated his contract of employment in a substantial manner and you may further find that this violation of company policy, if you find that it applied to the plaintiff, was sufficient grounds to justify the discharge of plaintiff from the defendant's employment.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writ-

ings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact, —unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law— must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and

the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity, or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a

common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the

amount of damages or compensation to which he believes the plaintiff or defendant is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting difference of opinion among yourselves.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay



aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

When you retire to consider of your verdicts you will take with you to the jury room the exhibits, these instructions and five forms of verdicts. You will thereupon elect one of your members foreman who is to speak for you and sign and date the verdicts unanimously agreed upon.

The plaintiff's two causes of action are to be considered by you separately and a separate verdict rendered as to each. Two forms of verdict are now given you relating to plaintiff's first cause of action. If you find for the plaintiff and against the defendant on plaintiff's first cause of action you will insert in the form of verdict which has been prepared for that purpose and which is marked Verdict No. 1 the amount which you find the plaintiff justly entitled to recover from the defendant upon plaintiff's first cause of action and you will thereupon date and sign the verdict and return the same into court as your verdict upon plaintiff's first cause of action.

If you find for the defendant and against the plaintiff upon plaintiff's first cause of action your foreman will date and sign the verdict which has been prepared for that contingency and which is marked Verdict No. 1-A, and you will return the same into court as your verdict on plaintiff's first cause of action.

If you find in favor of the plaintiff and against the defendant upon plaintiff's second cause of action you will insert in the blank space which has been left therefor the amount which you find the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict which has been marked Verdict No. 2 and you will return the same into court as your verdict on plaintiff's second cause of action.

If you find that the plaintiff is not entitled to recover from the defendant in any sum whatever on plaintiff's second cause of action, and you fur-

ther find that the defendant is entitled to recover from the plaintiff in some amount upon the defendant's counter claim, you will insert in the form of verdict which has been prepared for that contingency and which is marked Verdict No. 3, the amount which you find the defendant is entitled to recover of and from the plaintiff in the space left for such insertion and your foreman will thereupon date and sign the verdict and you will return the same into court as your verdict on plaintiff's second cause of action and defendant's counterclaim.

If you find that the plaintiff is not entitled to recover from the defendant in any sum whatever, and you further find that the defendant is not entitled to recover from the plaintiff in any sum whatever on plaintiff's second cause of action and defendant's counterclaim your foreman will date and sign the verdict which has been prepared for that contingency and which has been marked Verdict No. 4, and you will return the same into court as your verdict on plaintiff's second cause of action.

With your two verdicts, one a verdict upon plaintiff's first cause of action and the other a verdict upon plaintiff's second cause of action, you will also return into court the exhibits, these instructions and the forms of verdict not used by you.

Dated and signed at Anchorage, Alaska, this 19th day of March, 1952.

/s/ ANTHONY J. DIMOND,  
District Judge.

[Endorsed]: Filed March 20, 1952.

In the District Court for the Territory of Alaska.  
Third Division

[Title of Cause.]

### MINUTE ORDER

#### Trial by Jury Continued

Now at 10:00 o'clock a.m. came the Trial Jury, in charge of their sworn bailiff, who, on being called, each answered to his or her own name, came the respective parties, came also the respective counsel as heretofore and said Jury did present by and through their Foreman in open Court their verdict in cause No. A-7223, entitled Arthur W. Stephenson, plaintiff versus Alaska Air Lines Inc., defendant, which is in words and figures as follows, to-wit:

#### Verdict No. 1

We, the jury, duly sworn and impanelled to try the above entitled action, do find for the plaintiff and against the defendant upon plaintiff's first cause of action and find that the plaintiff is entitled to recover of and from the defendant upon plaintiff's first cause of action the sum of Eleven thousand fifty Dollars (\$11,050.00).

Dated at Anchorage, Alaska, this 19th day of March, 1952.

/s/ DELBERT W. HOSLER,  
Foreman

Entered Journal No. G-26, page No. 342, March 20, 1952.

[Endorsed]: Filed March 20, 1952.

Verdict No. 2

We, the jury, duly sworn and impanelled to try the above entitled action, do find for the plaintiff and against the defendant upon plaintiff's second cause of action and find that the plaintiff is entitled to recover of and from the defendant upon plaintiff's second cause of action the sum of Two thousand six hundred ninety-five Dollars and 20 cents (\$2,695.20).

Dated at Anchorage, Alaska, this 19th day of March, 1952.

/s/ DELBERT W. HOSLER,  
Foreman

Entered Journal No. G-26, page No. 342, March 20, 1952.

[Endorsed]: Filed March 20, 1952.

which verdicts the Court ordered filed and at this time upon motion of counsel for defendant, the Court ordered the trial Jury polled and each juror answered that this was his or her true verdict, and the Jury was excused to report at 10:00 o'clock a.m., of Monday, March 24, 1952.

Entered Journal No. G-26, page No. 342, March 20, 1952.

[Title of District Court and Cause.]

VERDICT No. 1-A

We, the jury, duly sworn and impanelled to try the above entitled action, do find for the defendant and against the plaintiff upon plaintiff's first cause of action.

Dated at Anchorage, Alaska, this .... day of March, 1952.

.....

Foreman

[Endorsed]: Filed March 20, 1952.



[Title of District Court and Cause.]

VERDICT No. 3

We, the jury, duly sworn and impanelled to try the above entitled action, do find that the plaintiff is not entitled to recover any sum whatever from the defendant upon plaintiff's second cause of action, and we further find that the defendant is entitled to recover of and from the plaintiff upon defendant's counter claim the sum of..... Dollars (\$.....).

Dated at Anchorage, Alaska, this.....day of March, 1952.

.....

Foreman

[Endorsed]: Filed March 20, 1952.

[Title of District Court and Cause.]

VERDICT No. 4

We, the jury, duly sworn and impanelled to try the above entitled action, do find that neither party to this action is entitled to recover any sum whatever from the other party, upon plaintiff's second cause of action.

Dated at Anchorage, Alaska, this ..... day of March, 1952.

.....

Foreman

[Endorsed]: Filed March 20, 1952.



[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND FOR ENTRY OF JUDGMENT FOR DEFENDANT

Comes now the defendant above named by and through its attorneys, McCutcheon & Nesbett, and moves that the verdict rendered by the jury on the Plaintiff's first and second causes of action be set aside, and that the court enter judgment in favor of the defendant in accordance with its motions for dismissal and directed verdict made at the close of the plaintiff's case, and further in accordance with Plaintiff's motion for directed verdict made at the close of all the evidence.

The court should have granted defendant's motion

for a directed verdict at the close of all the evidence, because the plaintiff's evidence was insufficient in law.

All the evidence is insufficient in law to form a basis for a verdict for the plaintiff.

McCUTCHEON & NESBETT,

Attorneys for Defendant,

/s/ By BUELL A. NESBETT

Acknowledgment of Service attached.

[Endorsed]: Filed March 29, 1952.

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In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

### MINUTE ORDER

Hearing on Motion to Set Aside Verdict and for  
Entry of Judgment for Defendant

Now at this time hearing on motion to set aside verdict and for entry of judgment for defendant in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant, came on regularly before the Court, the plaintiff not being present but represented by John Hughes, of his counsel, the defendant appearing by and through John Rader, of its counsel. The following proceedings were had, to-wit:

Argument to the Court was had by John Rader, for and in behalf of the defendant.

Argument to the Court was had by John Hughes, for and in behalf of the plaintiff.



Argument to the Court was had by John Rader, for and in behalf of the defendant.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, announced it would reserve its decision in this case.

Entered Journal No. G-26, page No. 396, April 4, 1952.

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In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

**MINUTE ORDER DENYING MOTION**

Now at this time upon motion of McCutcheon & Nesbett, for and in behalf of the defendant,

It Is Ordered that in cause No. A-7223, entitled Arthur W. Stephenson, plaintiff, versus Alaska Airlines, Inc., defendant, motion to set aside verdict and also motion for instructed verdict in favor of defendant, be and is hereby denied.

Entered Journal No. G-27, page 21, April 11, 1952.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND  
DISBURSEMENTS

Marshal's Fees: Serving complaint and summons, \$3.20; Clerk's Fees: Filing complaint, \$27.00; Witness Fees: Witness Stephenson, 4 days at \$4.00, \$16.00; Court Reporter: Partial transcript of proceedings, \$21.20.

United States of America,  
Territory of Alaska, Third Division—ss.

John C. Hughes, being duly sworn, deposes and says: That he is one of the Attorneys for the plaintiff in the above entitled cause, and as such is better informed relative to the above costs and disbursements, than the said plaintiff. That the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

/s/ JOHN C. HUGHES,

Subscribed and sworn to before me, this 16th day of April, A.D. 1952.

M. E. S. BRUNELLE,  
Clerk of the District Court, Territory of Alaska,  
Third Division.

/s/ By MOZELLE MADDEN,  
Deputy

[Endorsed]: Filed April 16, 1952.

In the District Court for the Territory of Alaska,  
Third Division

No. A-7223

ARTHUR W. STEPHENSON,

Plaintiff,

vs.

ALASKA AIRLINES, INC.,

Defendant.

### JUDGMENT

The above entitled cause came on regularly for hearing before the above entitled Court on the 14th, 17th, 18th and 19th days of March, 1952. The plaintiff was personally present in Court, together with John C. Hughes of Davis & Renfrew, his attorneys. The defendant was present in Court through its attorney Buell A. Nesbett of McCutcheon and Nesbett.

The matter was called for trial, and both parties announcing themselves ready for trial, a jury was chosen in the manner provided by law and according to the practices of this Court and the jury was thereupon duly sworn.

Opening statements were made to the jury on behalf of the respective parties and thereupon evidence was introduced on behalf of each of such parties.

At the close of the evidence the matter was argued to the jury by counsel for the respective parties and the Court instructed the jury upon the law and the

matter was submitted to the Jury and thereupon, on the 19th day of March, 1952, the jury returned its verdict in the above entitled cause in favor of the plaintiff and against the defendant as follows:

Found for the plaintiff and against the defendant on the plaintiff's first cause of action and found that the plaintiff was entitled to recover the sum of \$11,050.00 thereon.

Found for the plaintiff and against the defendant on the plaintiff's second cause of action and found that the plaintiff was entitled to recover of and from the defendant the sum of \$2695.00 thereon.

And the defendant's motion to set aside the verdict and for the entry of judgment for the defendant having been denied by the Court on April 11, 1952, and the Court being fully advised in the premises:

The Court expressly finds that the plaintiff Stephenson surrendered his employment with Western Air Lines and his seniority therein, for what the plaintiff then and thereafter believed to be a contract of employment of the plaintiff by the defendant for the period of at least two years at compensation of at least \$1300.00 per month. The jury by its verdict on the plaintiff's first cause of action has necessarily determined that such a contract was made and rendered verdict on the first cause of action accordingly.

Now, Therefore, in consideration of the premises

and the finding aforesaid, judgment is hereby rendered in favor of the plaintiff and against the defendant as follows:

1. That plaintiff do have and recover of and from the defendant, on plaintiff's first cause of action, the sum of \$11,050.00, together with the sum of \$ None toward plaintiff's attorneys' fees and plaintiff's costs and disbursements in this action to be taxed by the Clerk of this Court as provided by law and according to the practice of this Court.

2. That plaintiff do have and recover of and from the defendant, on plaintiff's second cause of action, the sum of \$2695.00, together with the sum of \$300.00 toward plaintiff's attorneys' fees, and plaintiff's costs and disbursements in this action to be taxed by the Clerk of this Court as provided by law and according to the practice of this Court.

Done in Open Court at Anchorage, Third Judicial Division, Territory of Alaska, this 18th day of April, 1952.

/s/ ANTHONY J. DIMOND,  
District Judge

Entered Journal No. G-27, page No. 47, April 18, 1952.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1952.

[Title of District Court and Cause.]

### JUDGMENT ROLL

Judgment for Plaintiff.

Principal: Pltf. recover \$11,050.00 on first action and \$2695.00 on second action with \$300.00 attorney fees and costs.

Docketed and entered April 18, 1952, Journal 27, page 47.

### Certificate

United States of America,  
Territory of Alaska, Third Judicial District—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Judicial Division, hereby certify that the foregoing constitutes a full, true, and complete Judgment Roll in the above entitled cause numbered A-7223.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled Court this 24th day of April, 1952.

[Seal]

M. E. S. BRUNELLE,  
Clerk

/s/ By MAY ANDLER,  
Deputy

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL ON PLAINTIFF'S  
FIRST CAUSE OF ACTION

Comes now the defendant, Alaska Airlines, Inc., by and through its attorneys, McCutcheon & Nesbett, and moves that the verdict of the jury in the above entitled cause be set aside and the judgment entered on the verdict be vacated and set aside and that a new trial be granted on plaintiff's first cause of action for the following reasons:

1. The verdict is contrary to law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and the evidence.
4. The verdict is contrary to the weight of the evidence.
5. There is no substantial evidence that the plaintiff and defendant entered into a valid or enforceable contract.
6. There is no substantial evidence from which the jury could find an estoppel or that an estoppel could exist under the applicable law.
7. The court erred in denying defendant's motion to direct a verdict in his favor at the close of the plaintiff's case.
8. The court erred in denying defendant's motion to direct a verdict in his favor at the close of all the evidence.
9. The court erred in denying defendant's motion to set aside verdict and for entry of judgment for defendant.

10. There is no sufficient or substantial evidence tending to support the amount of the Jury's verdict.

11. There is no sufficient or substantial evidence tending to show that the plaintiff has attempted to mitigate his damages.

12. There is no sufficient or substantial evidence tending to show that the plaintiff cannot mitigate his damages.

13. The verdict is excessive and appears to have been given under influence of passion and prejudice.

In the event this motion for new trial is denied, defendant prays the court order a remittitur.

Dated at Anchorage, Alaska, this 23 day of April, 1952.

McCUTCHEON & NESBETT,  
Attorneys for Defendant.

/s/ By BUELL A. NESBETT

Acknowledgment of Service.

[Endorsed]: Filed April 25, 1952.

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[Title of District Court and Cause.]

MOTION FOR NEW TRIAL ON PLAINTIFF'S  
SECOND CAUSE OF ACTION

Comes now the defendant, Alaska Airlines, Inc., by and through its attorneys, McCutcheon & Nesbett, and moves that the verdict of the jury in the above entitled cause be set aside and the judgment entered on the verdict be vacated and set aside and that a new trial be granted on plaintiff's second cause of action for the following reasons:



1. The verdict is contrary to law.
2. The verdict is contrary to the evidence.
3. The verdict is contrary to the law and the evidence.
4. The verdict is contrary to the weight of the evidence.
5. There is no substantial evidence that the plaintiff and defendant entered into a valid or enforceable contract.
6. There is no substantial evidence from which the jury could find an estoppel or that an estoppel could exist under the applicable law.
7. The court erred in denying defendant's motion to set aside verdict and for entry of judgment for defendant.
8. There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.
9. The verdict includes improper allowances for purchase of home, for rental of dwelling house, hire of auto to locate apartment, and purchase of clothing for family.

10. The verdict is excessive and appears to have been given under influence of passion and prejudice.

In the event this motion for new trial is denied, defendant prays the court order a remittitur.

Dated at Anchorage, Alaska, this 23rd day of April, 1952.

McCUTCHEON & NESBETT,  
Attorneys for Defendant.

/s/ By BUELL A. NESBETT

Acknowledgment of Service.

[Endorsed]: Filed April 25, 1952.

[Title of District Court and Cause.]

### EXECUTION

The President of the United States of America,  
Greeting:

To the Marshal of Said Division and Territory,

Whereas, Arthur W. Stephenson recovered judgment against Alaska Airlines, Inc., a corporation, in the United States District Court for said Division and Territory, holding terms as aforesaid on the 18th day of April, 1952, for the sum of thirteen thousand seven hundred forty-five Dollars with interest thereon at the rate of 8% per annum until paid, and costs of suit, amounting to three hundred sixty-seven and 40/100 (\$367.40) including three hundred dollars attorneys' fees.

Therefore, In the name of the United States of America, you are hereby commanded to levy upon and seize and take into execution the personal property of the said Alaska Airlines, Inc., in your Division of said District sufficient, subject to execution, to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are further commanded to make the amount of said judgment, interest, and increased cost out of real property not exempt by law, and make return of this writ within sixty days from the date hereof.

Herein Fail Not, and have you then and there this writ.

Witness the Honorable Anthony J. Dimond, Judge of said Court, and the seal of said Court hereto affixed this 30th day of April, 1952.

[Seal] M. E. S. BRUNELLE,  
Clerk

/s/ By MOZELLE MADDEN,  
Deputy

### Marshal's Return

United States of America, Third Division, Territory of Alaska.

I Hereby Certify, That I received the within execution on the 30th day of April, 1952, and that I served the same on the 30th day of April, 1952, on the Union Bank of Anchorage, in the person of A. H. Hassman, President of the Union Bank of Anchorage, to which Mr. Hassman made reply that the Union Bank of Anchorage had monies due and owing Alaska Airlines, Inc., defendant, the sum of \$ None.

WALTER E. HUNTLEY,  
United States Marshal

/s/ By IVAN H. BLOOD,  
Deputy U. S. Marshal

Marshal's Fees: 1—service, \$3.00; mileage (1), 20c; Total, \$3.20.

Received from the Marshal's Office Cashier's Check No. 27741 made payable to U. S. Marshal and endorsed by same in the amount of \$4,514.66 to satisfy the within Execution.

/s/ GERTRUDE KELLNER,  
Chief Deputy Clerk

Marshal's Return

United States of America,  
Third Judicial Division, Territory of Alaska—ss.

I Hereby Certify and Return That I received the within Execution on the 30th day of April, 1952, at Anchorage, Alaska, and personally served and executed same on the 1st day of May, 1952, by personally delivering to and leaving with D. I. Thomas, Vice President of the National Bank of Alaska and instructing him to turn over to me or my lawful representative all monies due and owing Alaska Airlines, Inc., said Defendant named therein, to which Mr. Thomas made reply that the National Bank of Alaska had the sum of \$4,514.66 due to said defendant upon which sum I then executed upon by taking into my possession and control.

Dated at Anchorage, Alaska, this 2nd day of May, 1952.

Marshal's Fees: Serving, \$3.00; mileage of one mile at 20 per mile, 20c; Total, \$3.20.

WALTER E. HUNTLEY,  
United States Marshal

/s/ By IVAN H. BLOOD,  
Deputy U. S. Marshal

Notice of Garnishment

You Will Please Take Notice that all moneys in your possession or under your control belonging to the defendant Alaska Airlines, Inc., a corporation, named in the Writ of Execution of which the annexed is a true copy, are attached by virtue of said writ and you are hereby required and notified not to pay over or transfer the same to anyone but myself.

Please furnish a statement.

Dated this 30th day of April, 1952.

WALTER E. HUNTLEY,

United States Marshal

/s/ By IVAN H. BLOOD,

Deputy Marshal

I hereby certify that the foregoing is a full, true and correct copy of the original Notice of Garnishment in the above entitled action.

WALTER E. HUNTLEY,

United States Marshal

/s/ By IVAN H. BLOOD,

Deputy Marshal

Statement of Garnishee

United States of America,  
Territory of Alaska—ss.

Walter E. Huntley, United States Marshal for the Third Division, Territory of Alaska, by Ivan H. Blood as Deputy Marshal, having applied to me as

President of the Union Bank of Anchorage, for information for the purpose of attachment and execution against the property of the defendant in the above entitled action, I, A. U. Hassman, the undersigned do hereby certify that the Union Bank of Anchorage has in its possession the sum of \$ None which is the property of the defendant.

Dated at Anchorage, Alaska, this 30th day of April, 1952.

UNION BANK OF ANCHORAGE,  
/s/ By A. U. HASSMAN,  
Its President

#### Notice of Garnishment

You Will Please Take Notice that all moneys in your possession or under your control belonging to the defendant Alaska Airlines, Inc., a corporation, named in the Writ of Execution of which the annexed is a true copy, are attached by virtue of said writ and you are hereby required and notified not to pay over or transfer the same to anyone but myself.

Please furnish a statement.

Dated this 1st day of May, 1952.

WALTER E. HUNTLEY,  
United States Marshal

/s/ By IVAN H. BLOOD,  
Deputy Marshal

Statement of Garnishee

United States of America,  
Territory of Alaska—ss.

Walter E. Huntley, United States Marshal for the Third Division, Territory of Alaska, by Ivan H. Blood as Deputy Marshal, having applied to me as Vice President of the National Bank of Alaska in Anchorage, for information for the purpose of attachment and execution against the property of the defendant in the above entitled action, I, D. I. Thomas, the undersigned do hereby certify that the National Bank of Alaska in Anchorage has in its possession the sum of \$4,514.66, which is the property of the defendant.

Dated at Anchorage, Alaska, this 1st day of May, 1952.

NATIONAL BANK OF ALASKA  
IN ANCHORAGE,

/s/ By D. I. THOMAS,

Its Vice President.

[Endorsed]: Filed May 2, 1952.

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In the District Court for the Territory of Alaska,  
Third Division

[Title of Cause.]

MINUTE ORDER

Denying Motions

Now at this time motions for new trial as to plaintiff's first and second causes of action submitted without argument heretofore and on the 2nd

day of May, 1952, in cause No. A-7223, entitled Arthur W. Stephenson, Plaintiff, versus Alaska Airlines, Inc., a corporation, Defendant.

Whereupon the Court now denies motions and counsel are so notified by the Clerk.

Entered Journal No. G-27, page No. 91, May 2, 1952.

[Title of District Court and Cause.]

### PARTIAL SATISFACTION OF JUDGMENT

Whereas, the above captioned Court did, on the 18th day of April, 1952, enter a judgment in favor of the plaintiff and against the defendant for the sum of \$13,745.00 plus costs, including attorney's fees, in the amount of \$367.40, and

Whereas, under date of April 30, 1952, execution was issued out of the captioned Court on the judgment above mentioned pursuant to which execution the sum of \$4514.66 was attached and taken into the possession of the United States Marshal in and for the Third Division, which satisfaction was returned on the 2nd day of May, 1952, and the sum so taken into possession was delivered to the Clerk of the District Court herein and which satisfaction showed increased costs on execution in the amount of \$6.40.

Now, Therefore, the undersigned plaintiff in the above captioned matter hereby authorizes and directs the Clerk of Courts in and for the Third Division to enter a partial satisfaction of record of said judgment in the said action in the sum of \$4514.66 minus the increased costs in the amount of \$6.40, the



same being the sum of \$4508.26.

The undersigned hereby certifies that there is a remaining balance due and owing on said judgment in the amount of \$9604.14.

Dated at Anchorage, Alaska, this 5th day of May, 1952.

/s/ ARTHUR W. STEPHENSON,  
Plaintiff.

DAVIS & RENFREW,  
Attorneys for Plaintiff.

/s/ By JOHN C. HUGHES

United States of America  
Territory of Alaska—ss.

This is to certify that on this 5th day of May, 1952, before me, the undersigned, a Notary Public **in and** for the Territory of Alaska, duly commissioned and sworn as such, personally appeared Arthur W. Stephenson, known to me and to me known to be the individual named in and who executed the foregoing partial satisfaction of judgment, and he acknowledged to me that he signed and sealed the same as his voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and official seal the day and year first hereinabove written.

[Seal] /s/ JOHN C. HUGHES,  
Notary Public for Alaska. My commission expires:  
4/9/55.

[Endorsed]: Filed May 5, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Alaska Airlines, Inc., the above named defendant, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain final judgment entered by the above entitled Court in the above entitled cause on the 18th day of April, 1952, by the terms of which judgment was granted in favor of the plaintiff, Arthur W. Stephenson, and against the defendant, Alaska Airlines, Inc., in the sum of \$11,050 on plaintiff's first cause of action, and the sum of \$2695, plus attorney's fees to the plaintiff in the sum of \$300, on plaintiff's second cause of action, and together with costs and disbursements to be taxed by the Clerk of the Court, such judgment having been entered on the said 18th day of April, 1952.

McCUTCHEON & NESBETT,  
Attorneys for Defendant.

/s/ By BUELL A. NESBETT  
Acknowledgment of Service attached.

[Endorsed]: Filed May 6, 1952.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the above entitled Court and to  
Davis & Renfrew, attorneys for the plaintiff,  
and To Whom It May Concern:

Please take notice that Alaska Airlines, Inc., de-

defendant above named and the appellant in this action, designates the entire record of this action as the record on appeal and specifically directs that all the records and the files in the Clerk's office pertaining to the above entitled action are to be included in such records, and among other things such record is to include specifically the reporter's transcript of the evidence introduced on the trial of the cause and all exhibits introduced on behalf of both parties to the action.

Dated at Anchorage, Alaska, this 14th day of May, 1952.

McCUTCHEON & NESBETT,  
Attorneys for appellant, Alaska  
Airlines, Inc.

/s/ By BUELL A. NESBETT  
Acknowledgment of Service attached.

[Endorsed]: Filed May 14, 1952.

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[Title of District Court and Cause.]

### STIPULATION

McCutcheon & Nesbett, attorneys for the defendant-appellee, and Davis & Renfrew, attorneys for the plaintiff-appellant, hereby stipulate and agree that appellant may have to and including the 4th day of August, 1952, to file and docket the record on appeal in the above entitled matter, and stipulate that in the event reporter's transcript has not been completed prior to the time above mentioned that the records and files in the Clerk's office may be

docketed within such period without the reporter's transcript and the reporter's transcript may be docketed at a subsequent date after the same is completed.

Dated at Anchorage, Alaska, this 13th day of June, 1952.

McCUTCHEON & NESBETT,  
Attorneys for defendant-  
appellee.

/s/ By BUELL A. NESBETT  
DAVIS & RENFREW,  
Attorneys for plaintiff-  
appellant.

/s/ By JOHN C. HUGHES

[Endorsed]: Filed June 16, 1952.

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[Title of District Court and Cause.]

### ORDER

Stipulation of counsel for the respective parties having been filed with this Court by the terms of which it is agreed between the parties that appellant may have until the 4th day of August, 1952, to file the docket the record on appeal in the above entitled cause, and the Court being fully advised in the premises,

Now, therefore, it is hereby ordered, adjudged and decreed that appellant may have an extension of time to and including the 4th day of August, 1952, to file and docket the record on appeal in the above entitled cause.

It is further ordered, adjudged and decreed that in accordance with such stipulation in the event reporter's transcript has not been delivered prior to the time when the appeal should be docketed in accordance with this order, then the Clerk is directed to forward the records and files in his office exclusive of the transcript to the Court of Appeals for the Ninth Circuit at San Francisco, California, in order that such cause may be docketed in such Court, and the reporter's transcript may be docketed at a later date after the same has been furnished.

Done in open Court at Anchorage, Third Division, Territory of Alaska, this 20th day of June, 1952.

/s/ ANTHONY J. DIMOND,  
District Judge.

Entered Journal No. G-27, page No. 217, June 20, 1952.

[Endorsed]: Filed June 20, 1952.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, M. E. S. Brunelle, Clerk of the above entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting here-

with the original papers in my office dealing with the above entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above entitled cause by the above entitled Court on April 18, 1952 to the United States Court of Appeals at San Francisco, California.

[Seal]            /s/ M. E. S. BRUNELLE,  
Clerk of the District Court for the Territory of  
Alaska, Third Division.

In the District Court for the District of Alaska  
Third Division

No. A-7223

ARTHUR W. STEPHENSON,           Plaintiff,  
  vs.  
ALASKA AIRLINES, INC., a corporation,  
  Defendant.

Anchorage, Alaska

March 11, 12, 13, 14, 17, 18, 19, 20, 1952

Before Honorable Anthony J. Dimond, U. S.  
District Judge, and a jury.

Mr. John C. Hughes, Attorney for the Plaintiff.  
Mr. Buell A. Nesbett, Attorney for the Defendant.  
Mary Keeney, Court Reporter. [1\*]

#### TRANSCRIPT OF PROCEEDINGS

On Tuesday, March 11, 1952, the above entitled matter came on regularly for trial in open court at Anchorage, Alaska, before The Honorable Anthony J. Dimond, United States District Judge.

The plaintiff appeared in person with his counsel, Mr. John C. Hughes.

The defendant was represented by Mr. Buell A. Nesbett.

A jury was duly selected, impaneled and sworn.

Mr. Nesbett: Your Honor, I would like at this time to know if we can argue a motion pending in this case tomorrow morning?

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\* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

Court: Yes, I was about to suggest that. I think we better come to my office. I think there is room; I know there is room enough for counsel and it is not necessary to have any of the parties. The arguments will take place, then, at 10:00 [3] if counsel desire.

Mr. Hughes: I have no desire to go earlier than 10:00; I was going to suggest 10:30.

Mr. Nesbett: My argument will be very short.

Court: If it is agreeable to both of counsel we will begin at 10:30. Counsel will have to shorten their arguments and divide the time between them.

Mr. Hughes: I will stipulate, Your Honor, not to take more than half the time.

Mr. Nesbett: I would like to request permission of the Court at this time to amend one figure in my counter claim in this action.

Court: What is that?

Mr. Nesbett: That is the figure in the middle of the 5th line of paragraph II of the counter claim, which is in paragraph III of the pleading, to amend the figure \$6,524.33 to \$2,924.33.

Court: Is there objection?

Mr. Hughes: No.

Court: Permission will be granted to amend the defendant's counter claim, as set forth in his answer, paragraph II, line 5; change the figure \$6,524.33 to \$2,924.33, and the clerk will make the alteration accordingly and initial it on the margin.

Thereupon, at 4:40 o'clock, p.m., the Court duly admonished the trial jury and continued



the cause until 2:00 o'clock, p.m., Wednesday, March 12, 1952. [4]

On Wednesday, March 12, 1952, at 10:00 o'clock, a.m., hearing in the above entitled matter was resumed before The Honorable Anthony J. Dimond, United States District Judge, the plaintiff being present in person with his counsel Mr. John C. Hughes, the defendant being represented by Mr. Buell A. Nesbett. The trial jury was not present. At that time the following proceedings were had:

Clerk: Your Honor, the plaintiff in the case just about to be argued, just filed a reply.

Court: Has counsel for defendants read this affidavit?

Mr. Nesbett: Yes, Your Honor, I got one about fifteen minutes ago.

Court: I must remind counsel that under our rules, all such affidavits must be filed at least one day before the hearing. To bring in an affidavit just at the verge of the hearing is not in accordance with the rules.

Mr. Hughes: I apologize for that, Your Honor; I know I am wrong. I was pressed; that is no excuse, but I just didn't get it in.

Court: I will read the affidavit and I will hear counsel in argument.

Mr. Nesbett: Your Honor, Mr. Hughes, the serving of the affidavit in opposition to our affidavit in support of the motion has made it a little inconvenient, but we realize Mr. Hughes has been very busy, and in consenting to argue the motion [5]

this morning he did make a concession; however, I don't think it changes the sense of our motion in this matter. Our motion is based on the provision contained in rule 56, that such a motion can be made, and we have based the motion on the pleadings and on the affidavit of Mr. Marshall in support of the motion, and specifically relied upon the statute of frauds, Your Honor. That is, that the agreement, from the very pleadings themselves, provide for an employment contract that would last longer than one year, and that it was not in writing. Now, the wording of the complaint states, in paragraph IV, Your Honor, reading only a part of that paragraph, "That prior to the said date of March 18, 1951, the defendant induced this plaintiff to sever his connection with the Western Air Lines, Inc., and did through its chairman of board of directors, R. W. Marshall, promise this plaintiff a contract with the Alaska Airlines, Inc., for a period of not less than two years from March 15, 1951, to March 15, 1953." I invite Your Honor's attention to the wording "promise this plaintiff a contract," and again in the same sentence, "for a period of not less than two years," from a certain date to a certain date. Mr. Marshall's affidavit denies specifically that any writing, and memorandum or any other written notation was ever made in connection with any such contract, and, of course, Your Honor, in our answer we have, in addition to pleading the statute of fraud as an affirmative defense, specifically denied in paragraph IV the allegations in connection

with the [6] making of any type of contract, oral, or any notation or writing or memorandum, and state that Mr. Stephenson, the plaintiff, on his own initiative, reading from the paragraph, "on two separate occasions traveled from Anchorage, Alaska, to New York City, on which said occasions plaintiff interviewed Raymond W. Marshall, Chairman of the Board of Directors of defendant corporation, requesting that defendant corporation enter into a contract of employment with plaintiff; that on each of said occasions plaintiff was denied a contract of employment and has never been employed by defendant under any arrangement other than that mentioned in paragraph II of this answer", and paragraph II provides for a month to month employment at a stated salary, plus a stated amount for expenses. Your Honor, the statute of frauds of Alaska, found in Section 58-2-2 of the Compiled Laws provides that any such contract is void, likewise, and it makes no difference which law we refer to; the law of New York provides that such a contract is void, and the text of the New York law can be found in a case entitled *Meltzer v. Koenigsberg*, reported in 99 New York Supplement 2nd, at page 143. This was a Supreme Court decision, decided in 1950, and there on page 146, Your Honor, the New York statute of frauds, insofar as our issue is concerned, is set out; it is entitled Section 31 of the Personal Property Law; reading, "Every agreement, promise, or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed

by the party [7] to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: 1. By its terms is not to be performed within one year from the making thereof, or the performance of which is not to be completed before the end of a lifetime." I cite that case only because it reports a very late version of the New York Law.

So, insofar as our motion is concerned, Your Honor, I think from the pleadings it would be obvious that the alleged contract would have been made in New York. I don't think Mr. Hughes would dispute that; it makes no difference. We admit, of course, he made two trips to New York; he wanted a contract, but he didn't ever get one. Assume, for the purpose of this argument that he got an oral contract in New York. I haven't had a chance to study this reply affidavit, but it appears that it is Mr. Stephenson's contention that he was introduced to Mr. Marshall by one Mr. Moe Howard when he was originally taken into employment with this company, which I presume was in New York City. I don't think there is any question about that. And applying the New York law—it would make no difference if we applied the Alaska law—if that contract was made there, and assuming that it was, even though it would be inconceivable, for the purpose of this argument, it is our contention, Your Honor, that the contract, if any, is void, and that under rule 56 we have every right to a summary judgment.

Court: Counsel for plaintiff may argue. [8]

Mr. Hughes: Your Honor, Mr. Nesbett, Mr. McMahan, Mr. Harper, and Mr. Rader, gentlemen, certainly the plaintiff in this case is not without knowledge of the statute of frauds, and it is not our position to urge upon the Court that the statute of frauds should not be zealously protected, because it is, and there are some exceptions to the rules set forth in the statute of frauds, and I think for the purpose of discussion we can admit the statute of frauds which we have here, and I take no exception to the law as stated, of New York, and, accordingly, we can assume, for the purpose of argument, that the law in the two jurisdictions is the same, as indicated by Mr. Nesbett. However, we feel that the situation as present here is clearly taken out of the statute of frauds by a situation that if it were not so allowed by the courts, that it would perpetrate just what the law is aimed to avoid, and that is fraud itself. Now, it is an established principle, so far as our practice is concerned, that the definition between law and equity is abolished and it is therefore, I think, uncontradicted. If it is contradicted it can be established that an estoppel need not be plead if it is capable of proof, and, accordingly, I would like to urge the Court to consider the provisions of the statute of frauds applicable to the doctrine of estoppel, which applies in peculiar cases, and this is what we consider to be one of those peculiar cases, and as set forth in the affidavit, and which we intend to prove, that there was a contract, an agreement to enter into a contract—that the terms thereof

were not at variance and it was just a matter as to when it was to be executed, and that this plaintiff was urged to sever relationships with a company with which he had long tenure; he had built up valuable rights, and he was urged by Mr. R. W. Marshall to do that because it was valuable to the company to have a man of his ability acting for the company at that time when they were securing certification, and in their future operations as a certificated carrier. I urge the Court's attention to the language as cited in American Jurisprudence, Volume 49, under statute of frauds, Section 583, at page 890, and I quote from that section:

“Conduct Amounting to Estoppel.—The doctrine of estoppel to assert the statute of frauds against a claim or defense based upon an oral contract is founded upon the general principles of estoppel in pais. The vital principle is that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such person to loss or injury, or to avail himself of that change to the prejudice of such other party. The party asserting the estoppel must, however, show affirmatively that he has done or omitted some act or changed his position to his prejudice in reliance upon the acts, conduct—active or passive—language, or representations of the person [10] sought to be estopped which he would not have done except for such acts, language or conduct. One of the primary considerations is the fact that

by reason of the failure of the other party to carry out the contract, the party asserting the estoppel suffers the infliction of an unjust and unconscionable injury and loss. It must be made to appear that there was such conduct on the part of the person against whom the estoppel is alleged as to make it a fraud for him to gainsay what he had expressly admitted by his words or tacitly confessed by his silence. Actual intent or design to mislead or deceive is not, however, essential. There need not be a corrupt motive or evil design; it is sufficient if the circumstances are such as to render it unconscionable to deny facts which the party by his silence or representation has caused the other party to believe in and act upon, and the denial of which must operate as a fraud upon him.

“As a general rule, after one party to an oral contract has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired, and has so far acted in this respect that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss, such party is held, [11] by force of his acts or silent acquiescence which have misled the other to his harm, to be estopped from setting up the statute of frauds. It is clear, however, that an estoppel to assert the statute of

frauds does not arise merely because an oral contract within the statute has been acted upon by the promisee and not performed by the promisor. Neither does an estoppel arise upon the mere refusal to make a writing as agreed. Where the entire transaction leading up to the making of the verbal contract is open and free from fraud or false representation, the subsequent failure to carry out that contract cannot of itself constitute an estoppel; otherwise, the court would open the door to the nullification of the statute of frauds. But even though the failure to reduce to writing a contract as agreed does not ordinarily constitute such fraud as to estop a person from asserting the statute, if he is thereby induced to change his position in a substantial respect, and so that such position cannot be restored, estoppel arises to preclude such assertion. An estoppel may be raised to defeat the defense of the statute of frauds although there is no fraud in the inception of the contract.”

And the next section, just the first line there—that’s 584, “There seems to be no reason for limiting the operation of the equitable doctrine of estoppel to assert the statute of frauds to any particular class of contracts included within the statute, provided always that the essential elements of an [12] estoppel are present.” It is common knowledge, I think, that the doctrine of estoppel more frequently arises in real estate contracts, real estate contracts being concerned with the higher affairs of man, being almost secondary almost to life, and,



accordingly, the rights in connection with real property are zealously protected by the law and the Courts in their decisions. I would like to call the attention of the Court to the case of Ernestine G. Wolf, Administratrix, and others, v. Wallingford Bank and Trust Company, cited at 117 American Law Reports, page 932, and there is considerable language there. The facts of that situation are, briefly—the administratrix of the estate gave a mortgage, during her duties as such administratrix, and later under an agreement with the mortgagee he was to foreclose this mortgage, and she was to have the property, to buy it back for herself, and the heirs of the real property, and owners of the lots, at an agreed and stipulated price, and there seemed to be no dispute as to the original agreement, but, acting in reliance upon that, the administratrix allowed herself to be defaulted in a court of law and lost her property, and subsequently the mortgagee, instead of conveying the property back to her, began selling it off, and in the meantime, and before the sales had been consummated, certainly, as to all of the property—maybe a fraction of it—she had made vast improvements by way of water and refurbishing of the house, and in that case the Court goes into it and follows almost the identical theory [13] and the thinking as set forth in the American Jurisprudence citation which I have just given the Court, and they have set forth the doctrine of estoppel, stating in effect that a non-conscionable loss or change of position introduced, and although it was

done orally and it should have, by the statute of frauds, have been in writing, and it not having been reduced to writing, no memorandum thereof appearing, still the facts themselves are so strong and the change of position of the party, in this case, a mere failure to act, was the reason for the arising of the action, and she foreclosed herself of the right to enter an appearance and reclaim her property, and the Court would not allow it. Now, then, that case is important, as is likewise the landmark case of *Seymour v. Oelerichs*, decided in 1910. That case is cited at 106 Pacific, 89, and I might advise the Court that this case is not the most recent case, but in its facts it is primarily almost identical to the situation we point out here. In this case there was a police officer who had been long engaged with the Police Department of the City of San Francisco, and he was contacted by a man by the name of Weiss, I believe, who was an agent for several persons, and was induced to quit his job with the San Francisco Police Department, when the agent well knew that the plaintiff had valuable rights there by way of tenure, and he could only be removed for good and sufficient cause; it was in the nature of a Civil Service job, as I understand it, on a municipal scale. The case [14] came up for trial and on the first trial the lower court refused a new trial, and the Superior Court reversed that and granted a new trial, and in granting a new trial advised the lower court that proof should be made of the agent—I call him Weiss—it may be another name—that Weiss

had a right to the defense in this action. In the meantime, Weiss had taken a trip and had not come back to execute the contract that he had promised, and then the Court went further and said that assuming that this authority to act can be shouldered by the plaintiff, the law is as follows, and then went through the same rational. It may be alleged by counsel for the defendant that this is dicta. In that respect, it is an unusual case, because the Court made an order reversing it, sending it back for a new trial—went forward and decided matters in contemplation of a second trial, and the second trial was reported at 122 Pacific, 847, and it was sent back for trial, and the points on which it came up indicate that these matters considered in this case were not even—certainly the majority of them—were not even discussed. The court found judgment in favor of the plaintiff, granted him some \$11,000.00 plus some 7% interest, I think it was, from the date November 4, 1912, but the court threw out the interest. Now, then, this is the language that is set forth in the case that is cited, and on Shepardizing the case I find it is mentioned considerably, and so far as I know, stands, with possibly a few other cases, in [15] a class of its own, and naturally we are to expect that the statute of frauds is not something to be tampered with lightly—and that decision is too long to read, but it commences on page 93, where the Court says, “In our discussion we shall assume, of course, that Oelerichs was duly authorized to enter into such a contract on behalf

of the defendants as is alleged to have been made by him with the plaintiff." Upon assuming that, they go into the matter of estoppel. There is so much language in here that it is hard to take out; on page 94—"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed, and it is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.'" Further, on the same page, "The vital principle is that of who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both." Your Honor, the case so well treats the doctrine of estoppel, and just under this type of [16] a situation, that I don't want to take the time to go through the whole thing, but I will submit that the only thing that the plaintiff must do in order to come within this provision is to establish that he did have an agreement for a contract—that the promise thereof was definitely, or within reasonable bounds, established, and that even though it could

not be performed within one year—in this case it was a ten year contract—makes no difference if, in reliance upon that, he acted to his detriment, and that doesn't mean he just changed employment or that he was inconvenienced in a small way. That certainly is not the case.

I might urge upon the Court that we propose to show that Mr. Stephenson is a skilled man with long tenure in the industry, and it was just such a man that Mr. Marshall had to have; he knew that, or he wouldn't have hired him, and there is considerable back of that; I think that that can be established; Mr. Stephenson was just the type of man they needed. Mr. Stephenson had employment; he had good employment; he had worked for Western Airlines throughout their operations and had been with them, exclusive of military service, and other assignments in the industry, for many years. He was working as an airlines pilot during the last war, of course; he was a Colonel in a certain branch of the Air Force. That did not break up his continuity of service with Western, because their contract had a provision in that regard. He had zealously protected that [17] record of employment, and had never worked otherwise. Now, then, he was a senior pilot, and he takes 180 days, which is the maximum allowed, and his superior authorized him to take the maximum—to come to do this job, and we can establish that before the deadline expired he goes to New York, to Mr. Marshall's office, and he puts the proposition up to him; "What am I going to do? My

time expired; I have just got time to get back to Los Angeles on the 18th day of March, 1951, or else I am out of my seniority." Mr. Marshall was advised, and he did know that the deadline had been reached and unless he had this contract he was going to suffer a loss that never could be restored, and one that was gained by a good many years of hard labor. And upon the full knowledge of that, and we contend that it was a full knowledge of the facts, Mr. Marshall said, "No, we want you to stay with the company; we've got a place for you; don't worry about the contract," words to that effect; "Go on back there and as soon as the certificate is granted and we know which way it is going, through Fairbanks or Anchorage, you will get your contract; the arrangements as to your moving will all be taken care of; rest in peace; don't worry about it," words to that effect. I may be embellishing, Your Honor, but that was the impression, and the language of Mr. Marshall was such as to rock this man into some mood of a sense of security, because certainly no man is going to forego a life's work for a 30 day job, and that is about the situation, and we feel that [18] the facts are such that they fall within the rule of estoppel, and that they are taken out of the statute of frauds by that type of operation, and that the case is on all fours with the Seymour case just cited to the Court, and accordingly the motion should be denied. Thank you.

Mr. Nesbett: Your Honor, of course we have no quarrel with the doctrine of primary estoppel

where someone makes a promise, or representation of facts and causes another to change position to his detriment. We read the Seymour case, also, and know it is an established doctrine, at least in the courts of California, and they apply that doctrine to prove the statute of frauds, as a means of perpetrating fraud. I think, Your Honor, the main reason for this statute is to prevent fraud. To prevent people coming in, for example, in situations analogous to this, claiming a contract for five years, and may produce several witnesses, produce perjured testimony, possibly, sticking some honest person on a conjured set of facts; that can happen. Now, the Seymour case—the man apparently had some Civil Service rating, and he gave it up; however, the contract, or promise to make a contract, was admitted, and we took the trouble, Your Honor, to run down that Seymour case in the books and we found that just as recent as 1951 in California, and by the Supreme Court of that state, a case entitled *Ruinello v. Murray* was decided, and reported in 227 *Pacific*, 2nd, at page 251. Here we find a situation where a man worked years as [19] engineer of a large building in Los Angeles, and he was induced by the owner of another building to leave that position and come to be manager of this other building at an increase in salary, plus a percentage of the profits, to be figured at the end of the year, 20% of the gross profits; so he gave up this position as manager of the first building, to his detriment, as it turned out later. He accepted the new position for a period of time,

one year, and when it came time to figure the profits, and he was entitled to a nice commission, they refused to go through with the contract. The plaintiff, of course, filed a complaint, and the defendant alleged that a sufficient change of position on the part of the plaintiff had not been shown. You have these facts—lifetime employment in one building, 23 years—giving all that up to take a better position, losing it at the end of a year, and the admitted contract, or promise to make a contract. The Court says, in headnotes 2 and 3—in the opinion in support of headnotes 2 and 3, quoting, “To state a cause of action based on unconscionable injury it is not enough to allege that plaintiff gave up existing employment to work for the defendant.” Going on, “Plaintiff alleges that he resigned a permanent lifetime position under an oral contract with another employer to enter defendant’s employ. This allegation does not show that plaintiff will suffer an unconscionable injury if the oral contract with defendant is not enforced. Ordinarily a contract for permanent employment, for life employment, for so long as the employee chooses, or for other terms indicating permanent employment, is interpreted as a contract for an indefinite period, terminable at the will of either party, unless it is based on some consideration other than the services to be rendered.” Now, the complaint was held to be inadequate, and the Court said, in headnote 6—now, three different judges had considered this, Your Honor—“Although the deficiencies in plaintiff’s complaints are raised in



defendant's demurrers, after three attempts he has not overcome them. The trial court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend."

There has been nothing in the pleading here to show that Mr. Stephenson had anything other than employment at the will of Western Airlines. I am assuming that he gave that up. Your Honor, if this promise to give a contract was made by Mr. Marshall to Mr. Stephenson, I firmly believe that the law of New York would apply. As to the wording of the statute of frauds, in both jurisdictions it is exactly the same, in that it provides that such a contract is void. Now, in Restatement of Conflict of Laws, Section 334, page 412, that section says, quoting, "a. The law of the place of contracting determines whether the contract must be in writing in order to be valid. It also determines the adequacy of the writing and the necessity [21] for witnesses and acknowledgment before a notary public or other public officer." And, b. dealing specifically with the statute of frauds and the place of contracting, "The requirements of writing may be a requirement of procedure or a requirement of validity, or both. If, for instance, the statute of frauds of the place of contracting is interpreted as meaning that no evidence of an oral contract will be received by the court, it is a procedural statute, and inapplicable in the courts of any other state. If, however, the statute of frauds of the

place of contracting is interpreted as making satisfaction of the statute essential to the binding character of the promise, no action can be maintained on an oral promise there made in that or any other state; and if the statute of frauds of the place of contracting makes an oral promise voidable, and the promissor avoids such a promise, the same result follows." And another situation, "If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, an oral contract will be enforced though it does not conform to either statute."

Now, Your Honor, here we have the situation, under the wording of the New York statute, this contract is void. Under the wording of the Alaska statute this contract is void. Those statutes are such statutes as say, in dealing with a specific type of contract, that no evidence will be admitted in connection with the contract that would be procedural. The wording of [22] these statutes goes directly to the validity, and they say that it is void. Now, I have a case which I invite Your Honor's attention to; it is entitled *Kahn v. Cecelia Company*, decided in the District Court, Southern District of New York, in 1941, reported in 40 Federal Supplement at page 878. Now, in this situation the plaintiff was promised employment for three years at a salary of \$1,000.00 a week and, as he alleges in his complaint, he entered into this employment solely on the condition that the promise that the verbal or oral employment contract would be later reduced to writing in the form of a con-

tract, and that he left his employment and that he worked for a period of several years for his new employer at the salary; that he brought business to his employer, so forth and so on, and then his employer refused to recognize the employment contract any longer and he sued, and he asked the court to do the very thing that Mr. Stephenson is asking here, and that is ignore the statute of frauds and apply the doctrine of estoppel, and the Court said, in headnote 2 on page 879, "The sole ground urged by the plaintiff to sustain the first cause of action is that the defendant is estopped to interpose the statute of frauds as a defense. Personal Property Law N.Y. Section 31. This is a clear recognition that the cause of action cannot stand if the allegations in support of the estoppel are insufficient. These allegations are criticized by the defendant as mere conclusions. I prefer, however, not to take that ground, as I do not believe [23] that 'promissory estoppel,' on which the plaintiff relies, has any application to the case under New York law. The doctrine of 'promissory estoppel' is of comparatively recent origin, and has usually been resorted to as a substitute for consideration." Then, the opinion goes on, Your Honor, to explain what they mean there, and that is a case of public subscriptions, I believe, to some college where the Court finally got around to holding them liable on the grounds there was no consideration because one had signed a consideration to support a contract and caused others to make similar promises, and so forth. And in the last part

of the opinion the Court says, in discussing an exactly similar case, "The real basis for the decision was that the Court was not willing to permit the 'practical nullification of the Statute of Frauds'," citing several New York cases. "The motion of the defendant to dismiss the first cause of action on the ground that it fails to state a claim is accordingly granted."

There is another case in New York entitled *Newkirk v. Bradley*, 1947, Supreme Court, Appellate Division, reported in 67 New York Supplement, 2nd, at page 459. Here, Your Honor, the defendant actually made an agency agreement with the plaintiff providing, amongst other things, that if the plaintiff would go out and sell certain machinery, he would give him commission on the sale in addition to also giving him the agency to contract the particular type of machine manufactured by the [24] defendant for a long, long time. The plaintiff went out and performed fully, and seeks to enforce this oral contract, and the judge denied it. On page 461, under headnote 2, the Court said, "We are not impressed by plaintiff's argument that, since defendant's promise was to execute a written contract granting him the exclusive sales agency, thereby a completed contract breached by defendant is pleaded. On the contrary, we conclude that defendant's alleged promise to reduce this agency contract to writing adds nothing to the enforceability of the agreement."

I cite this case only to show, your Honor, that New York does not recognize the doctrine—*Deutsch vs.*

Textile Waste Merchandising Company, 209 New York Supplement, 388, Supreme Court, Appellate Division, 1925—it is interesting to note that in the latter paragraphs of the complaint they plead the facts upon which they could claim promissory estoppel. The doctrine was never, apparently, proposed in argument, and never considered by the Court, and the case was decided on the basis of the alleged agreement, being a contract to give a contract, and the Court, and this is the authority for it, said, we will not do that sort of thing; the alleged contract was within the statute of frauds, and we will not take it out, even assuming there was an agreement to give a written contract. That is about all he's pleaded here, if you take into consideration this last affidavit that he's filed. Now, in the complaint he says that prior to March 17th he had a contract. Now, your Honor, at 10:15 this [25] morning we learn that he says and is going to apparently prove that a contract was in the background somewhere when he discussed the matter with Mr. Marshall, and prior to March 18th Mr. Marshall says "Wait until we've got a certificate; everything will be all right; you go about your business and we'll take care of that contract later." That last case I cited is exactly on the nose with the situation they cite in their reply affidavit; the contract to give a contract, or a promise to give a written contract. According to this affidavit, he took the proposed contract into Mr. Marshall and said, "Look; I've got to know what to do; time is running short insofar as my leave is concerned," and

by his own words, Mr. Marshall says, "Don't get excited, maybe we'll get a certificate and if we do we'll go into all this sort of thing, and you don't need to worry." That is clearly on the nose of this last contract, promise to give a written contract, and I don't know of any jurisdiction that will take that out of the statute of frauds. We have a case as recent as 1949, your Honor, in New York, entitled *Wikiosco vs. Proller*, Supreme Court, Appellate Division, reported in 94 New York Supplement, 2nd, 645. Here two people mutually agreed they would organize a corporation and each contribute certain money, to be reduced to writing, and the plaintiff went ahead and performed and the defendant failed to perform, and he is trying to enforce the promise to make a contract, and the decision is the same, your Honor. I won't take [26] your time on it, but I wanted to invite your attention to it if you care to read it. Mr. Hughes cited this Wallingford case in 117 American Law Reports. I haven't read it; apparently there was a mortgage on the property and the administratrix and the mortgagee agreed that the mortgagee would foreclose, and the administratrix could buy in at the sale; there was nothing in writing, and the mortgagee refused to perform. Now, that involves real property, your Honor. I know that the real property provision of the statute of frauds in New York is of that wording that says any evidence will be admitted of such a contract. It is very easy, then, for the Court to ignore the statute of frauds. I distinguish that case from the situation we have here,

because we are under one or the other jurisdiction, and either of them says it's void. I can find that specific wording of the New York law, but I don't think it is particularly applicable because we are not dealing with property; we are dealing with personal rights. I believe that is all, your Honor.

Court: Decision is reserved; I will have an answer by 2:00 this afternoon when we go to trial.

The Court stands in recess until 1:30.

Whereupon, at 2:00 o'clock p.m. on the twelfth day of March, 1952, the trial by jury in the above entitled cause was resumed; the members of the jury panel being present and each person answering to his or her name, the parties being present as [27] heretofore, The Honorable Anthony J. Dimond, United States District Judge, presiding;

And thereupon, the following proceedings were had:

Court: Earlier today the parties argued a motion, citing a number of authorities. I have examined the authorities, but they lead to further inquiry that I think ought to be made, and without making a final decision on the question of law involved, the motion presented is now denied without prejudice with the right to renew it in any proper form at a later time. This necessarily involves putting before the jury some evidence that would not be before the jury if the motion is granted, but that cannot well be avoided. The jury is already impaneled and I think we better proceed to the trial. There is another advantage in the decision just made, and that is that in the event of

an appeal, the whole matter will be before the Court of Appeals and we may thereby eliminate the necessity of having two appeals instead of one. So, as a pro forma ruling, the motion is denied.

Opening statements were made by counsel for the plaintiff and counsel for the defendant.

Court: A witness may be called on behalf of the plaintiff.

Mr. Hughes: At this time, your Honor, I would like to renew my motion——

Court: All persons who are or may be witnesses in the case are required to remain outside of the court room until [28] individually called as witnesses, and I will expect counsel to keep a supervisory eye on the attendance and see that some witness who has not heard of this rule will not be present. Now, that includes any witness who may be one of the defendants in the case, as well as others.

Mr. Nesbett: Your Honor, isn't it proper that an officer of the corporation, even though he is to be a witness—Mr. Marshall—be permitted to remain in the court room?

Court: You may have one witness to represent your corporation, even though he is a witness. It was suggested yesterday that Mr. McMahon would be a witness; if so, he should remain out of the court room. Now, a witness may be called on behalf of plaintiff.

Mr. Hughes: I would like to call Mr. Stephenson, please.



Whereupon,

ARTHUR W. STEPHENSON

the plaintiff, was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Hughes): Will you please state your full name? A. Arthur W. Stephenson.

Q. And what is your occupation at the present time, Mr. Stephenson?

A. My last occupation which I worked was vice president and general manager of Alaska Airlines. [29]

Q. And prior to that time, sir, what was your occupation?

A. From May 5, 1928, until September 18, 1951, I was either a pilot, a director, a vice president, or a division superintendent of Western Airlines.

Q. And what was your last employment with Western Airlines? A. As a pilot.

Q. And how long had that employment existed?

A. I had been in that position since—I had always been on the pilot seniority list, since the fifth day of May, 1928. I had been flying regularly since September 25, 1945, when I returned from the service.

Q. And was your last employment an employment of your choice, by virtue of selection, within the company? A. That's right.

Q. And will you please state exactly what positions in a supervisory capacity you have had dur-

(Testimony of A. W. Stephenson.)

ing your employment with Western Airlines prior to September 22, 1950?

A. Western Airlines was originally made part of the Los Angeles-Salt Lake Division of National Parks Airways, from Salt Lake north. I was one of the organizers of National Parks Airways and I acted as chief pilot, vice president in charge of operations, until it was sold to Western in 1937. From 1937 to 1939 I stayed as division superintendent for Western Airlines at Salt Lake. In 1939 I took leave of absence from Western to organize and reinstate Inland Airways in operation. [30] Inland operated from Denver to Great Falls and from Denver to Huron, South Dakota. I returned to Western and in 1940 and 1941 I spent six months leave of absence with the Seaport Airlines, helping them to prepare a request and go through the hearing for a certificate to operate paralleling the railroad. In March, 1942, I was called back to active duty in the air force and remained on active duty until September, 1945. Then I was asked if I wanted to continue flying or take an executive position, and I requested that I be put back on flying status and I stayed there.

Q. Then did you remain on flying status from 1945 until the fall of 1950?      A. That's right.

Q. Now, then, Mr. Stephenson, will you please state how you happened to become associated with Alaska Airlines?

A. About the fifteenth of September—fourteenth or fifteenth of September—I received a telephone

(Testimony of A. W. Stephenson.)

call from Mr. Alvin P. Adams. Mr. Adams was in Mr. Marshall's office in New York, and wanted to know if I could immediately——

Mr. Nesbett: Your Honor, I will object to anything Mr. Adams told Mr. Stephenson on the telephone, as being hearsay.

Court: This is merely preliminary; overruled; go ahead.

A. He asked if I would immediately go to Anchorage, Alaska, for Alaska Airlines. He said they needed a general manager, someone to take charge of their operation. I advised him that [31] I would prefer to come to New York and get acquainted with Mr. Marshall and become familiar with what their problems were, which is what I did.

Q. Did you, pursuant to this telephone call, go to New York?           A. That's right.

Q. About what time did you arrive in New York, as you recall?

A. It was about the nineteenth of September.

Q. Now, on or about the nineteenth day of September, 1950, then, who did you see from Alaska Airlines in New York?

A. I was taken to Mr. Marshall's office by Mr. Moe Howard, of Alvin Adams Company, and introduced to him.

Q. Did Mr. Marshall explain to you——

Court: Is Alvin Adams connected with the Alaska Airlines—is he an officer?

Mr. Stephenson: No, sir. At that time Alvin Adams managed an aviation consultant firm who

(Testimony of A. W. Stephenson.)

had a contract for survey cases with Alaska Airlines, and the management survey program.

Court: All right; go ahead.

Q. I asked you who you consulted from Alaska Airlines, and your answer was——

A. Mr. Marshall.

Q. Now, then, did Mr. Marshall advise you of the problem of Alaska Airlines?           A. Yes.

Q. What was the proposition, or the problem?

A. The immediate problem was negotiating a working agreement with the pilots.

Q. And did he have a long range problem?

A. Yes, he did; he wanted—Mr. Bierds, who was vice president here in Anchorage, was ill and he needed to replace him in his work immediately.

Q. Did you agree to become employed by the Alaska Airlines at that time?

A. That's right; I did.

Q. What was your agreement of employment at that time?

A. I explained to Mr. Marshall that I could get a six months, or rather 180 days leave of absence from Western Airlines, and I could get it immediately and go to work for Alaska Airlines, and assume the duties that he had outlined for me.

Q. Did you at that time contemplate that you were to work for more than six months?

A. The understanding was that between six weeks and three months after that date we would get together and prepare a long range agreement of some kind.

(Testimony of A. W. Stephenson.)

Q. And did you discuss, on or about September 19, your wages that you were to receive during your employment?

A. That's right; I was to get \$1,300.00 a month.

Q. Were you to receive any other compensation?

A. At that time Alaska Airlines had an application for a certificate of convenience and necessity, to operate between Alaska and Seattle and to Portland, pending, and had high hopes of it being forthcoming before very long. The understanding we had was that I was to work for \$1,300.00 a month until we got that certificate, then a revision upward would be made in salary. There was also some discussion of being given an option on some stock of Alaska Airlines; it was very low at that time.

Q. Was this in addition to the contract, or as a part of the consideration?

A. Well, it would have been part of the consideration.

Q. Did you ever receive any stock of Alaska Airlines as a result of this?

A. No; the proposal wasn't stock as a gift—an option to purchase at what was then the current price.

Q. Well, you stated that you were to receive \$1,300.00 a month; was there anything in addition to that, in regard to compensation, that you were to receive forthwith?

A. Naturally I was to be paid travel expenses when travelling away from Anchorage, and also

(Testimony of A. W. Stephenson.)

it would be necessary to move, possibly to Anchorage, or possible to Seattle once the certificate was issued, and that my expense of making that move would be paid.

Q. Was there any set figure as to how much expenses, or was it just any expense that you might have in regard to moving? [34]

A. There was no set figure, no.

Q. Was there any price range discussed in regards to your travelling expenses?

A. Not in regard to my travelling expenses, no.

Q. In regards to your expenses of removal from California to Anchorage? A. No.

Q. Did you at that time advise Mr. Marshall of the limitations of your leave of absence from Western Airlines? A. I did.

Q. Now, then, Mr. Stephenson, was the execution of a contract contingent upon the acquiring of a certificate by Alaska Airlines?

A. The principal item concerned there was what the salary and expense arrangement would be once Alaska got their certificate. Mr. Marshall was reluctant to make a commitment on that until we found out what route was certificated and what the possibilities would be.

Q. Well, that doesn't quite answer my question. The question was whether or not the execution of a written contract was contingent upon the issuance of the certificate.

A. No, it was not, because the understanding

(Testimony of A. W. Stephenson.)

was that we would go ahead with continuous employment regardless of the certificate.

Q. What was the discussion, if any, as to the eventuality of [35] the issuance of the certificate, in regard to your compensation, or tenure?

A. Well, it was agreed that a certificate, whether we got it or not, and what points were to be served, would certainly have quite an effect on the company, and the salary was to be commensurate with the size of the operation; and, on the other hand, if they did not receive a certificate, it would still be necessary to have some sort of an agreement to cover a long term period of employment with Alaska Airlines, because I had a limited time in which I could retain my rights with Western.

Q. Now, Mr. Stephenson, was there any period—I am referring—to revert just a minute, was there any age limit or definite period when you had to retire in your service in Western Airlines?

A. No.

Q. Now, then, was there any fixed time when this contract was to be reduced to writing?

A. It was expected that the certificate would be forthcoming within the next month or so, and that we could then reduce a contract to writing.

Q. You just said something there—you said it was expected that the certificate would be forthcoming within the next month or so and that you could reduce the contract to writing; now, you answered previously that the contract was not con-

(Testimony of A. W. Stephenson.)

tingent [36] upon the issuance of the certificate; how do you reconcile those two propositions?

A. One thing involved in the contract would be whether there would be a good remunerative certificate issued to Alaska Airlines, and as to what the salary would be, whether it would be a large operation or would continue as a smaller operation just within Alaska, and with the non-scheduled operation that was being carried on.

Q. Well, did you discuss the step-up proposition of wages? A. That's right.

Q. Well, was that in fact what was contemplated? If it wasn't, well, say so, but I would like to know.

A. Well, certainly we discussed an increase in wages in case the certificate was allowed.

Q. Well, now, this was on September 19th; now, will you please state what the next occasion was on which you discussed your contract with Mr. Marshall or a member or officer of the Alaska Airlines?

Mr. Nesbett: Your Honor, could I interrupt just a moment? Mr. Marshall is unable to hear the testimony of the witness; I wonder if I could, just for his testimony, set a chair over between the witness and the jury.

Court: All right. Counsel may proceed.

Q. The question was, when did you next discuss the matter of the contract with Mr. Marshall or an officer of the Alaska [37] Airlines.

A. About the 6th of January, 1951.



(Testimony of A. W. Stephenson.)

Q. And what was the occasion of this discussion?

A. I had been to Dayton and Washington and New York on company business and I also took that occasion to remind Mr. Marshall that three months had elapsed. My family was still in California, and that, as I had expressed in September, it was time to make a permanent arrangement of some kind—a long range agreement.

Q. Well, now, did you say that on the 6th day of January, 1951, that it was time to make one, or didn't you state that it was already—

Mr. Nesbett: I will have to object; I don't mind a certain amount of leading, but—

Court: Counsel is going too far.

Mr. Hughes: I will withdraw the question, Your Honor.

Q. You stated that it was time to make an agreement, is that right?      A. That's right.

Q. Well, then, you hadn't an agreement up until January 6, 1951?

Court: Did you say January 6th or 16th?

Mr. Hughes: January 6th. Did I misstate that date?

Court: No, counsel was right.

A. That is correct.

Q. Well, did you make an agreement at that time? [38]

A. No; Mr. Marshall was reluctant to do so because as yet we didn't have the certificate, and at that time we discussed the stock option and he asked

(Testimony of A. W. Stephenson.)

that we wait until we had further word on the certificate.

Q. Well, did you make any arrangements in regards to compensation or wages, or any terms of employment, as of January 6, 1951?

A. At that time Mr. Marshall agreed with me that I was right in insisting that I should have my family with me, and I should bring my family to Anchorage, and that the company should participate in the expense of that.

Q. Well, did you do that? A. I did that.

Q. Did you own a home in California at that time? A. Right.

Q. Did you sell it or lease it? A. No.

Q. What was the status of your home following January 6, 1951 to the present date, then?

A. I still—I have a Veterans' Loan on it and I am still keeping it vacant.

Q. All right, then; you removed your family to Alaska following January 6, 1951. Now, then, when was it that you next discussed the contract with Mr. Marshall or any officer of Alaska Airlines? [39]

A. It was, I believe, the 16th of March. 16th or 17th—possibly both days.

Q. The 16th day of March of 1951, is that correct? A. Yes; that's correct.

Q. Well, now, will you state the occasion for your discussion at that time?

A. I advised Mr. Marshall that my last day of leave was the 17th of March and that I would have to report to Western Airlines in person on the 18th

(Testimony of A. W. Stephenson.)

or my employment with Western would be terminated.

Q. Now, where did this discussion take place?

A. In Mr. Marshall's office in New York.

Q. And who else was present?

A. There was no one else present.

Q. Well, did you advise Mr. Marshall anything further than that—was that the full text of your advice to him in this regard?

A. I believe so.

Q. Do you recall, is that substantially the language you used?

A. If I could have the answer read back to me—

Court: Why not have the witness say what he said to Mr. Marshall and Mr. Marshall to him, what they agreed upon and did not agree upon. Your answer may be read back, however.

(Reporter: "I advised Mr. Marshall that my last day of leave was the 17th of March and that I would have to report to [40] Western Airlines in person on the 18th or my employment with Western would be terminated.")

A. And that I thought we should consummate and complete some sort of an agreement.

Q. What did Mr. Marshall tell you on this occasion?

A. I indicated to him that I thought I should have a contract for four years and that the increase in salary could be contingent upon the date we

(Testimony of A. W. Stephenson.)

started operating from Alaska to Seattle.

Q. Did Mr. Marshall agree to that point, or what did he say?

A. He agreed that it was time a contract should be written but he was reluctant to do so until the certificate was issued.

Q. Well, did Mr. Marshall make any representations to you as to what the agreement was going to be?

A. Well, my idea of it was that it should be for four years and he thought that would be a little too long, or too long, and that possibly two years would be agreeable, but that he didn't want to do that until the certificate was issued.

Q. Well, did you agree on two years?

A. Yes; it would have been satisfactory to me at that time to have done it that way.

Q. Well, did the two of you agree on a contract at that time, or a term?

A. I conceded that point to him.

Q. Did you agree on wages? [41]

A. We agreed that the present wage would continue until the certificate was issued.

Mr. Nesbett: Could I have that answer read back, Your Honor?

Reporter: "We agreed that the present wage would continue until the certificate was issued."

Court: The court will stand in recess for ten minutes.

(Whereupon the court recessed from 3:02 o'clock, p.m. until 3:12 o'clock, p.m., at which time the following proceedings were had:)

(Testimony of A. W. Stephenson.)

Court: Without objection the record will show all members of the jury to be present. Counsel may proceed with examination of the witness.

Q. Mr. Stephenson, you were telling us of your conference with Mr. Marshall on March 16, 1951. How long a conference did you have with Mr. Marshall at that time?

A. Well, two afternoons; I believe it was the 15th and 16th, or 16th and 17th, I'm not sure which; several hours each afternoon.

Q. Now, I don't want to prompt you, Mr. Stephenson; I would like to have you tell if there is anything pertinent in regards to your agreement of employment that took place between yourself and Mr. Marshall that you have not already told us. Beginning with the commencement of your conference tell us the text of your conversation back and forth. [42]

A. My principal concern at that time, and I expressed it to Mr. Marshall, was that I must be back in Los Angeles on the 18th or forfeit my rights with Western Airlines, and I remember once telling him that I better make up my mind—we better make up our minds—where I was going tomorrow; whether I was going to Anchorage or Los Angeles, and he again assured me—he said “Let's go along and we'll get a contract worked up when we get this certificate.” We discussed many items, minor items of operation in Seattle and Anchorage, and intermittently interspersed our conversation

(Testimony of A. W. Stephenson.)

with discussions about a long term agreement with me.

Q. Now, did you at that time offer a memorandum agreement to Mr. Marshall?

A. I offered him a memorandum of—it wasn't in agreement form; it was simply four or five paragraphs stating the things that I thought should be incorporated into an agreement.

Q. Do you have that instrument with you?

A. No, I do not.

Q. Do you know what happened to it?

A. I left a copy of it with Mr. Marshall and my copy I have lost or misplaced somewhere.

Q. Well, do you recall the text of the memorandum?

A. The text of the memorandum pertained—one or two paragraphs pertained to the method of operation, the division of responsibility, and the assignment of functions to the Alaska [43] office of Alaska Airlines—to their Anchorage Office—and I had stated in my memorandum that I thought there should be a four year written agreement and I did not press the salary increase at that time until a certificate—an increase in salary when the certificate was granted.

Q. Did you set forth a salary in your memorandum?

A. Yes; I asked that I be at least paid \$18,000.00 a year over the \$15,300.00 that I was being paid.

Q. I didn't understand that; would you just repeat that again?

(Testimony of A. W. Stephenson.)

A. I insisted that it be that much of an increase when the certificate was issued.

Q. The difference between what figures?

A. Fifteen three and eighteen thousand.

Q. Is that the figure that you were being paid, at the first figure, fifteen three?

A. That's right.

Q. Well, now, do you recall Mr. Marshall's statements in regard to this instrument when you delivered it to him?

A. His statement was that he didn't—that now wasn't the time to complete an agreement; we would still wait until we got the certificate and knew what we had, what size the operation would be, where I might live. The thinking was that if we got a certificate to the States we could operate out of Seattle rather than Anchorage.

Q. Well, did Mr. Marshall take issue with your memorandum [44] agreement as to salary?

A. No, he did not.

Q. Did he take issue with it as to time, duration?

A. He suggested—indicated that two years would be a much better arrangement for him, he thought, than four.

Q. Did you in fact enter into a meeting of the minds, or agreement?      A. Yes.

Mr. Nesbett: Object, Your Honor, as calling for a conclusion of the witness.

Court: Objection sustained.

(Testimony of A. W. Stephenson.)

Mr. Nesbett: And move to strike any portion of the answer that might have been reported.

Reporter: I got "yes".

Court: That will be stricken.

Q. Well, what did Mr. Marshall advise you to do, if anything?

A. He advised me to go on back to Anchorage and when we get this certificate and get squared away, why, we will make a satisfactory agreement.

Q. Did you advise Mr. Marshall before you left New York as to whether or not you had severed relations with Western Airlines?

A. I advised him—yes, that I was calling Western on the telephone and telling them that I would not be back.

Q. Did you at that time fix any definite date for a future [45] meeting?      A. No, we did not.

Q. Now, Mr. Stephenson, you have mentioned your rights with Western Airlines; will you please state what those rights are?

A. Well, there are a great many rights under Western's Pilots' Contract; one of them is the right of taking 180 days leave with the consent of the company and returning to your—then being able to return to your run, station, and status of employment. The seniority rights give the senior pilot the choice of routes and trips, or runs, over those routes and it in fact guarantees to the pilot that as long as he is physically qualified, technically qualified, guarantees his employment—certainly with the exception of misconduct or inefficiency.



(Testimony of A. W. Stephenson.)

Q. And what, if any, other limitations on that service with Western Airlines was set forth in the contract, other than what you have mentioned?

A. There are no limitations on age; it is not mentioned or considered in the contract. The only thing that age could limit would naturally be being unfit physically.

Q. Have you at any time since you were dismissed by Alaska Airlines, attempted to go back to Western Airlines?

A. No, because there is no—I received my final pay check, my termination pay check, which was for accrued vacation, [46] right after the 18th of March.

Q. Assuming that it would be possible for you to go back, what would be your status?

A. I couldn't go back to work for Western Airlines.

Q. Why couldn't you?

A. Because I have lost all of my seniority, and I would have to be 27 years of age or under to qualify to fly.

Q. Then, it would be impossible for you to go back and start up through the ranks again at your age, is that correct?

A. That's right.

Q. What was your compensation with Western Airlines, Mr. Stephenson—that is, in the last two years that you worked for them?

A. I don't have the actual withholding reports here, but it depended on the type of aircraft and the run you chose to fly. It averaged from around be-

(Testimony of A. W. Stephenson.)

tween \$1,100.00 and \$1,200.00 a month flying a Convair, which was a little less pay than flying a DC-4, and it also depended on whether I chose a night or day run.

Q. All right, now; to get back to the 15th and 16th of March, your conference with Mr. Marshall; when did this conference terminate?

A. It was either on the afternoon of the 16th or the 17th.

Q. And did you receive any instructions from Mr. Marshall on the termination of your conference? [47]

A. No; the only understanding we had was I was going back to Anchorage—coming back to the West Coast and to Anchorage and continue.

Q. Did you state that a date was set for a future meeting?           A. No.

Q. Was there, then, a time agreed for the execution of a formal agreement between you—that is, a written agreement between you?

A. No; the only—it was understood that that would be in order when we heard from the President and the Civil Aeronautics Board on a certificate.

Q. When did you hear from the President of the Board on the certificate?

A. That was on the 24th of May—24th or 25th of May.

Q. Was the certificate granted?

A. It was.

(Testimony of A. W. Stephenson.)

Q. Well, did you at that time renew your request for a formal contract?

A. No, not at that time. I had discussed it before that; it was between the 7th and the 17th of April.

Q. Will you please state the circumstances of that discussion?

A. On about the last of March, either the last days of March or the first day or two of April, I went to Seattle—I was accompanied by Mr. Nesbett as far as Seattle—he was going on to San Francisco—and at that time I believe Mr. [48] McCutcheon was in New York and he phoned me and told me that he and Governor Gruening—

Mr. Nesbett: Your Honor, object to that as being hearsay, of course.

Mr. Hughes: Your Honor, I believe Mr. McCutcheon is an officer of the corporation.

Court: Was he President of Alaska Airlines?

Mr. Stephenson: He was the President.

Court: You may tell what Mr. McCutcheon said.

A. That I come to New York and complete an agreement with Alaska Airlines.

Q. And did you go to New York at that time?

A. I did.

Q. And did you at that time have a written memorandum?

A. I did; I had it drawn in the form of an agreement.

Q. I would like to show you this instrument and ask you if you recognize it?           A. Yes.

(Testimony of A. W. Stephenson.)

Q. Where did you first see that agreement?

A. That was prepared in New York.

Q. Do you know who prepared it?

A. Yes; I had a typist in the Ambassador Hotel in New York type it and suggestions were made by Mr. McCutcheon as to the form of it.

Q. Was that agreement ever shown to Mr. Marshall? [49]

A. Yes; I gave him a copy of it.

Mr. Nesbett: We have no objection, Your Honor.

Court: It may be admitted and marked Plaintiff's Exhibit 1 and may be read to the jury.

Clerk: It is an agreement dated blank day of April, 1951.

(Mr. Hughes read Plaintiff's Exhibit 1 to the jury.)

#### PLAINTIFF'S EXHIBIT NO. 1

This agreement made and entered into this... day of April, 1951 by and between Alaska Airlines, Inc., an Alaskan Corporation engaged in the air transportation business, party of the first part hereinafter referred to as the Corporation, and A. W. Stephenson, party of the second part, hereinafter referred to as Manager.

Witnesseth:

In consideration of their mutual promises each to the other the parties hereto agree as follows:

The Corporation agrees to employ A. W. Stephenson in the capacity of General Manager of the business affairs of the Corporation for a period of four

(4) years commencing this day at and for the yearly salary of eighteen thousand dollars (\$18,000.00) payable in monthly salary payments of fifteen hundred dollars (\$1500.00) per month.

It is further agreed that in event the Corporation takes over or merges with any air carrier the salary of the Manager may be adjusted in accordance with the increase in business and responsibility. Said adjustment to be arbitrated promptly by the selection of one person representing the Corporation, one representing the Manager and a third person agreed upon and selected by the two arbitrators, the majority decision of the arbitrators to be binding on the parties hereto for the balance of this contract.

It is further agreed that in event the Corporation is awarded a certificate of convenience and necessity authorizing scheduled service between Alaska and the United States the salary of the Manager shall be increased from the time of the commencement of its operation under the certificate to the yearly salary of twenty-three thousand dollars (\$23,000.00.)

It is understood between the parties hereto that the duty and authority of General Manager shall be the active full time management of affairs of said corporation business including full control over all personnel. The Manager shall have authority to bind the company to contracts necessary to the conduct of usual and ordinary business of the Corporation including contracts for charter and hire of air-

(Testimony of A. W. Stephenson.)

craft for the transportation of passengers and freight.

The Manager shall have control over moneys received from business carried on within the territory of Alaska and disbursement thereof to the extent of needs for the current ordinary and usual business of the company.

It is agreed between the parties that the Corporation shall be responsible for and protect the Manager against all actions in law or equity that may arise or be brought against the Manager by reason of his office with the company.

It is agreed that the Corporation will reimburse the Manager for any out of pocket expense incurred in behalf and for the benefit of the Corporation.

Witness the hand and seal of the parties hereto the day and date first appearing herein.

.....

Alaska Airlines, Inc.

Witness:

.....

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Mr. Nesbett: Your Honor, I think it should be made plain that the Alaska Airlines signature line is unsigned—just typed.

Mr. Hughes: If there is any misunderstanding on that, it is a signature space made available, as counsel points out, for the Alaska Airlines.

Q. I will ask you if this agreement was presented to Mr. Marshall?           A. It was.

(Testimony of A. W. Stephenson.)

Q. And what was the result of its presentation to him?

A. He said he would refer it to his attorneys for their recommendation and report on it.

Q. Was there anything discussed in regard to the contents of the contract—did he make any statement in that regard?

A. I don't remember. We discussed the arbitration clause in there and also the possibility that instead of making it for four years it should be made for two.

Q. Well, was this contract ever signed?

A. No; he promised to get his attorneys' opinion on that contract and then we would get together again and— [50]

Q. Did Mr. Marshall at that time say when?

A. Well, within the next few days.

Q. How long did you remain in Washington, or New York, on this occasion?

A. About, I believe that was presented to Mr. Marshall on the 7th and I left there on the 17th day of April.

Q. Did you have any further discussion in regard to this proposed—

A. Yes; I discussed it with Mr. McMahon and again with Mr. Marshall.

Q. Well, what was the result of your discussion?

A. There was no agreement on that contract. At the time it was the same answer I had gotten be-

(Testimony of A. W. Stephenson.)

fore, that we don't have the certificate yet; let's wait until we get that.

Q. Now, at that time, Mr. McCutcheon—do you know whether he was President of the corporation?

A. He was.

Q. Is Mr. McCutcheon still President of the corporation? A. So far as I know he is.

Q. Did the President of the corporation have any duties in regard to the hiring of employees, if you know?

A. No, he didn't perform in those duties. What the duties, or what authority he has under the charter and by-laws, I don't know.

Q. Well, do you know why Mr. McCutcheon made up this agreement? [51]

A. It was because it was his idea of what sort of an agreement we should have.

Q. Is this agreement different from the memorandum which you submitted?

A. Well, this is in the form of an agreement. The memorandum was simply just a paragraphed statement of the points that should be covered in an agreement.

Q. Well, did this Exhibit 1 square up with the memorandum agreement?

A. Yes, it was approximately the same; it was simply putting in the proper legal verbage the memorandum, and it included some additional items. I think the arbitration clause was Mr. McCutcheon's idea.

Q. Well, after you submitted this contract, did



(Testimony of A. W. Stephenson.)

you have any other dealings in regards to a contract, with Mr. Marshall?

A. Yes; after several days I again discussed it with Mr. Marshall.

Q. And what was the result of that discussion—what took place?

A. What had happened was that Mr. Marshall had suggested that I get together with Mr. McMahon and go over the terms, go over this contract and rewrite a draft that would be acceptable from a legal standpoint, and bring it back to him.

Q. And was that done?

A. We discussed it on several different days and eventually Mr. McMahon wrote up an agreement in the form of a letter and told me he had it ready and went with me into Mr. Marshall's [52] office and handed it to me in there.

Q. Well, was any action taken on that letter?

A. No.

Q. Now, was there any change in Mr. Marshall's statements to you between on or about March 15, 1951 and his statements of April 7, 1951?

Mr. Nesbett: Your Honor, object to that. The facts will speak for themselves; the testimony has been brought out.

Court: Objection sustained; he can tell what Mr. Marshall said on this occasion.

Q. Well, after the letter that Mr. McMahon prepared, did you make any other attempts at writing an agreement? A. No.

(Testimony of A. W. Stephenson.)

Q. Well, then, as far as the execution of a contract, that's where the matter rested, is that correct?      A. That's right.

Q. Well, when did you terminate your services with Alaska Airlines?

A. On the 22nd or 23rd of August; the 23rd, I believe.

Q. And how were you terminated?

A. By Mr. Marshall.

Q. And was any reason given for your dismissal?

A. Not at that time.

Q. And what was your last date of receiving compensation from Alaska Airlines, Inc.? [53]

A. The last pay check I received was for the month of July.

Q. And what have you done since you were last employed by Alaska Airlines?

A. I have remained here in Anchorage.

Q. Have you sought employment?

A. Not in Alaska, no.

Q. Well, have you sought employment elsewhere?

A. I have not contacted any prospective employer, no.

Q. Well, why haven't you contacted any?

A. Because there is a question of becoming involved as to just what my status was with Alaska Airlines, whether I could go to another airline and be employed as an officer or in a supervisory capacity, until it was definite as to what my status was as to Alaska Airlines. I have never received

(Testimony of A. W. Stephenson.)

any notice that I had been removed as an officer by the Board of Directors. I have received a letter—letters—from Mr. Marshall terminating me as of—paywise as of October 15, 1951.

Q. When you say that you are not sure that you were removed from your status as Vice President, how, if you know, were you given that status?

A. By a resolution of the Board of Directors, or the Executive Committee, I'm not sure which; either one has power to do it.

Q. Was there any other reason for you to remain here and not seek employment? [54]

A. The principal reason was to settle my affairs with Alaska Airlines first.

Q. Well, is there something other than in regard to your wages that has to be settled?

A. Yes; there is one other civil suit.

Q. Well, now, Mr. Stephenson, will you please explain the general procedure for your payment of wages and your expense account while employed with the Alaska Airlines, Inc.?

A. The general procedure—the pay checks were—our payrolls were kept and computed in Paine Field, Everett, Washington, and the checks were issued there and forwarded to the employees here in Anchorage and to outlying districts in Alaska. Expense—there's two forms of expense voucher; one is per diem, commonly used by flight crews; that form was actual expense, and was normally prepared on a voucher that covered one week, and

(Testimony of A. W. Stephenson.)

with it was submitted the hotel bills and transportation receipts and so forth.

Q. Well, now, in regards to your wages; first, you have stated, I believe, that your last pay check was received in what month?

A. It was for the month of July.

Q. For the month of July. And have you received any accounting from Alaska Airlines, Inc. in that regard, showing your wages?

A. I received a withholding tax form, W-2, I believe it is, [55] for the federal and the Alaska territorial.

Q. Does the Accounting Office put out a debit and credit statement in regard to your wages?

A. No, not normally; not so far as wages are concerned.

Q. Well, then, I would like to ask you if you recognize this?           A. Yes.

Q. And where did you first see that instrument?

A. About the 1st of February, 1952.

Q. Where did it come from?

A. It came in the mail from Paine Field, Everett, Washington.

Mr. Nesbett: We have no objection, Your Honor.

Court: Is it offered in evidence?

Mr. Hughes: It is offered in evidence.

Court: It may be admitted and marked Plaintiff's Exhibit 2 and may be read to the jury.

Clerk: Withholding Statement of 1951.

Mr. Hughes: With the permission of the Court,

(Testimony of A. W. Stephenson.)

I would like to omit the fine print. It is a withholding statement on Form W-2.

(Mr. Hughes then read Plaintiff's Exhibit 2 to the jury).

Q. Mr. Stephenson, in regard to the figure as shown on Exhibit 2, is it your statement that you received that, or that you did not receive that figure of \$12,350.00?

A. I did not receive 2½ months of it.

Q. How much would that be? [56]

A. \$3,250.00 before tax deduction.

Q. And for what periods, then, would it be that you did not receive the money?

A. For the period of August-September, and the first half of October.

Court: The Court will stand in recess for ten minutes to take up some other matters.

Thereupon the Court recessed from 4:00 o'clock, p.m. until 4:10 o'clock, p.m. at which time the following proceedings were had:

Court: Without objection the record will show all members of the jury present, and counsel may proceed with examination of the witness.

Mr. Hughes: If the Court please, I would like to digress. I left part of my exhibits at the office, and I would like to go back to some of the earlier testimony.

Court: Very well.

Q. Mr. Stephenson, at the time that you state that you took leave from Western Airlines, did you

(Testimony of A. W. Stephenson.)

receive any communication in that regard?

A. Yes; I received a confirmation of the leave of absence.

Q. I ask you, Mr. Stephenson, if you recognize this document?      A. Yes, I do.

Q. And was that delivered to you, or was it mailed to you?

A. It was mailed to me. [57]

Q. And what firm or person mailed it to you?

A. Western Airlines.

Q. Do you recognize the signature on that document?

A. Yes; it is signed by Mr. E. N. Whitney, by J.L.T., or Jack L. Thayer, the chief pilot.

Mr. Hughes: I would like to offer this in evidence.

Mr. Nesbitt: We have no objection, your Honor.

Court: It may be admitted and marked Plaintiff's Exhibit No. 3 and may be read to the jury.

Clerk: Interoffice correspondence, dated September 22, 1950.

(Mr. Hughes then read Plaintiff's Exhibit 3 to the jury.)

Q. Now, Mr. Stephenson, Exhibit No. 3 makes reference to the Airline Pilot's Contract; do you have a copy of that contract in your possession?

A. Yes; there's one there on the desk.

Q. I ask you if you recognize this pamphlet, or document?      A. Yes, I do.

Q. What does that purport to be, Mr. Stephenson?

(Testimony of A. W. Stephenson.)

A. That is a contract between the pilots of Western Airlines and the management of Western Airlines, the pilots being represented by the Airline Pilots' Association.

Q. What is the date of that contract?

A. It's dated—amended to January 1st, 1949.

Q. Was this pamphlet issued to you, or how did it come into [58] your possession?

A. It is issued; it's part of the agreement; it requires that it be printed by the company and given to each pilot.

Q. Is that the document made reference to in Exhibit 3 that I just showed you?

A. Right.

Q. You are positive that this booklet is the document that reference is made to in Exhibit 3?

A. Right.

Q. Did you have any part in the negotiation of that contract, sir?

A. Not this one.

Mr. Hughes: I would like to offer this in evidence.

Mr. Nesbett: Your Honor, apparently this agreement was executed—a portion of it—in 1940, and another portion on April 21 of 1949. There is nothing to indicate that this agreement—could I ask Mr. Stephenson a question?

Court: Yes.

#### Cross Examination

Q. (By Mr. Nesbett): Where does it say how long this agreement is to continue, Mr. Stephenson?

A. If you will look at the closing paragraph of

(Testimony of A. W. Stephenson.)

the agreement, it is renewable on the anniversary date unless by 30 days notice of either party, and if it is not revised, it [59] continues in effect. The portion you referred to as dated in 1940 is the Board of Adjustment Agreement, which is a separate agreement.

Mr. Nesbett: We want to press the point, your Honor, that there is nothing to indicate from the record that it is renewed.

Court: I understood the witness to say it was in effect on this particular date.

Mr. Nesbett: It doesn't say so.

Court: Without objection it may be admitted, and marked Plaintiff's Exhibit 4. Is it necessary to read all of that to the jury?

Mr. Hughes: I would prefer not to read all of it, your Honor; I would read Section 23.

Court: All right, and either counsel later may read any section they desire, either in argument or presentation of the case; it makes no difference whether the witness is on the stand or not, or the witness may be recalled if that is necessary. Counsel may read Section 23 and such other portions as he desires at this time.

(Mr. Hughes then read Section 23 of Plaintiff's Exhibit 4 to the jury.)

Direct Examination—(Continued)

Q. (By Mr. Hughes): Now, Mr. Stephenson, did you then, after you took up your duties with



(Testimony of A. W. Stephenson.)

Alaska Airlines, receive any communication from [60] Mr. R. W. Marshall to that effect?

A. There was a communication sent by Mr. Marshall to the offices at Anchorage and Seattle, with a copy to me, I believe.

Q. Do you recall the date of that instrument?

A. It was about September 22nd.

Q. I ask you if you recognize this document?

A. Yes, I do.

Q. And when did you first see that instrument?

A. Well, some time during the week of—some time after September 22, 1950.

Q. Do you recognize the signature thereon?

A. Yes.

Q. And whose signature is it?

A. It's one of R. W. Marshall's.

Mr. Nesbett: No objection.

Court: Without objection it may be admitted, marked Plaintiff's Exhibit 5, and may be read to the jury.

(Mr. Hughes then read Plaintiff's Exhibit 5 to the jury.)

## PLAINTIFF'S EXHIBIT No. 5

Alaska Airlines  
Avoid Oral Instructions  
Also Use for Pencil Memo's

Date September 22, 1950

To Mr. E. S. Hudson—EV  
From Mr. R. W. Marshall—NY  
Subject Mr. A. W. Stephenson

Mr. A. W. Stephenson has been chosen vice president and general manager of the company as of today. He will make his headquarters in Anchorage and immediately take charge of the company's operations there. He plans to stop at Chicago to visit ALPA and will meet with the pilots on Tuesday but will probably want you to attend with him.

I am sending a copy of this only to Mr. McCutcheon in Anchorage because I felt that you would want to inform Bob Long.

/s/ R. W. MARSHALL.

Copies to Mr. S. J. McKutcheon—HQ; Mr. D. R. Whiting—EV; Mr. A. W. Stephenson—EV.  
RWM C O

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Court: Trial will be suspended at this time. Ladies and gentlemen of the jury, whenever you separate, the judge is compelled to admonish you that you must not discuss this case among yourselves or with others, or listen to anything about it; you must not form or express an opinion about it until it is finally submitted to you. It is of the

highest importance that you obey this advice, pay attention to it, because it is your [61] sworn duty to decide the case upon the sworn testimony you hear in the court room, not something you may read in the newspapers or hear over the radio, or something someone may say to you on the street, and we all know how sometimes chance remarks stick in our minds which we ought to disregard. If anyone should attempt to talk to you about this case, tell him you are on the jury, and if anyone should persist, which is not likely, that person should be reported to the Court for treatment according to law. You may now retire and return tomorrow morning at 10:00. The trial will be continued until 10:00 tomorrow morning. The Court will remain in session for other business.

Whereupon, at 4:30 o'clock, p. m., March 12, 1952, the trial of the above-entitled cause was continued until 10:00 o'clock, a.m., March 13, 1952.

Be it further remembered, that at 10:00 o'clock, a.m., on the thirteenth day of March, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding;

And thereupon, the following proceedings were had:

Court: The witness, Mr. Stephenson, may resume the stand; counsel may proceed with examination.

(Testimony of A. W. Stephenson.)

Q. (By Mr. Hughes): Mr. Stephenson, I believe yesterday we concluded with the [62] introduction of Exhibit No. 5, is that not correct, reporter?

Reporter: Yes.

Q. We had digressed at that time; you were previously testifying in regard to your wages. Did you receive the compensation agreed upon during the time that you were employed with Alaska Airlines, up to October 15th?

A. No, I did not.

Q. And then, referring to Exhibit No. 2, which shows an earned income of \$12,350.00, did you receive that amount?      A. I did not.

Q. And how much of that did you receive?

A. May I see the exhibit? I received \$9,150.00, before taxes, of the \$12,350.00 shown on Exhibit 2.

Q. You received \$9,150.00 before taxes?

A. Right.

Q. Did you receive——

A. Just a moment—I should correct that figure; it is \$12,350.00 less \$3,250; that would be \$9,000.00.

Q. Did you receive a credit for any wages, to your knowledge?

A. In a statement handed to me on the nineteenth of September, a credit was shown for the first half of August check and the next eight days, less taxes.

Q. And from whom was this statement received, Mr. Stephenson?

(Testimony of A. W. Stephenson.)

A. From Mr. Fink of the accounting department of Alaska Airlines.

Q. I ask you if you recognize this document?

A. Yes, I do.

Q. Is that the statement that you received from Mr. Fink?

A. That's right.

Q. And when did you receive it?

A. On the nineteenth of September.

Q. And in whose presence did you receive it?

A. Mr. Fink and Mr. McMahon.

Mr. Nesbitt: Do you want to introduce it?

Mr. Hughes: Yes.

Mr. Nesbitt: We have no objection.

Court: It may be admitted; marked Plaintiff's Exhibit 6, and may be read to the jury.

Clerk: Statement dated September 11, 1951.

Q. Mr. Stephenson, did you normally receive statements of wages by way of credit memorandum or other document from the company?

A. The only statement concerning wages was the check with the voucher showing the pay period and tax withheld and the balance due, and showing the amount of the face of the check payable to me.

Q. Other than Exhibit 2 and Exhibit 6, have you ever received any statement from the company showing what your wages were or what you had drawn, or the credit thereof?

A. With the exception of what was shown in Exhibit 6, no.

Q. Then, I believe you stated that there were

(Testimony of A. W. Stephenson.)

certain specific [64] periods that you had not been paid for; will you please restate—

A. I had not been paid for August and September and the first half of October, 1951, with the exception that they had shown credit for the first 23 days of August in Exhibit 6.

Q. That is August, September—

A. And the first half of October.

Q. Now, is it your statement that—are those wages still due and owing? A. That's right.

Q. Now, in regard to your expenses, what was the procedure in regard to establishing a legitimate expense in the furtherance of your employment?

A. In reporting expense it was to make out the weekly expense voucher and the hotel bills attached, hotel and transportation tickets and so forth.

Q. Did you, during the course of your employment, issue any memorandum of instruction to employees in regard to expense?

A. Not concerning weekly expense vouchers; I did issue an instruction here in Anchorage to employees on per diem, to be more accurate in their reporting their time of arrival and departure from the station.

Q. Were there any such regulations in effect at the time that you commenced your employment in 1950?

A. There was a regulation put out by Mr. Marshall in January of [65] 1951.

Q. I show you this exhibit and ask you if you recognize this?

(Testimony of A. W. Stephenson.)

Court: Did you say 1951?

Mr. Stephenson: That's right, sir.

A. Yes; this is the memorandum.

Q. Was that issued through your office, or——

A. No.

Q. How did you first become acquainted with it?

A. It was mimeographed and circulated out of Everett, Paine Field.

Q. Did your office up here receive a supply of such memorandum? A. Yes.

Mr. Nesbett: We have no objection.

Court: It may be admitted, marked Plaintiff's Exhibit 7, and may be read to the jury. Plaintiff's Exhibit 6 has not yet been read; if counsel wish to stipulate, it can be considered as read, and read in argument, or referred to in argument.

Mr. Nesbett: I will stipulate it can be considered as read.

Court: Is it a compilation of figures?

Mr. Hughes: Yes.

Court: I doubt if anyone could remember all those figures.

Mr. Nesbett: Or Exhibit 7—if you want to read the last paragraph——

Court: Counsel may read what he wishes to, or none of it, [66] and it may be read in argument.

Mr. Hughes: I would like to read a portion, at least, of Number 7.

(Mr. Hughes then read the last paragraph on page 2, of Plaintiff's Exhibit 7.)

(Testimony of A. W. Stephenson.)

Q. Now, Mr. Stephenson, did you submit vouchers to the company in corroboration of your expenses? A. I did.

Q. And will you please state whether or not you were credited with the vouchers so submitted?

A. I was credited with some \$1,678.00 worth of vouchers during November, December, January and February—November and December of 1950 and January and February of 1951.

Q. Well, then did you have any difference with the company in regard to expenses up to and through February of 1951?

A. Not until February 11, 1951.

Q. And what difference arose at that time?

A. I found that the accounting department was not giving me credit for vouchers submitted, and the support for the vouchers was not being kept with the vouchers and maintained in the treasury department at Everett.

Q. You say you found that; how did you discover that?

A. Because I inquired as to what credits I had against advances on expense accounts, and they could give me no information.

Q. Did you transmit these vouchers by letter?

A. No; normally I would prepare them, or complete them, when I was in Everett, and file them there.

Q. Did you obtain receipts for those vouchers?

A. Not up to that time I hadn't.

Q. Well, did you continue to follow the same



(Testimony of A. W. Stephenson.)

line of submission of vouchers throughout your employment?

A. I continued to prepare the vouchers with the supporting data, and advised the accounting department that I wanted a statement of credits due me and also I insisted that they have the support for those vouchers filed with them in the accounting office.

Q. Did they comply?           A. No.

Q. Well, what was done?

A. I told them that I had my vouchers prepared, with the support, and had them ready to submit when I could obtain the receipt for them and could get credits for the vouchers that I had submitted.

Q. Well, did you then hold up on your vouchers?

A. I kept them in my brief case.

Q. How long did this continue?

A. This continued for several months.

Q. Did you receive statements from the company on debit and credit balance for any months after February of 1951?

A. Dated April 30, I received it some time during the month of May—a statement which only showed a balance—no record of the debits and credits.

Q. Did you likewise receive any statements for the subsequent months, and, if so, how many months did you receive?

A. I didn't receive any statements for the fiscal year, from November until some time in May when this statement dated April 30th was submitted.

(Testimony of A. W. Stephenson.)

Q. And do you have that statement with you?

A. Yes.

Q. May I see it, please?           A. Yes.

Q. And was this received in the regular mails?

A. Yes.

Q. And what does that statement disclose?

A. It shows as of April 30th, a balance carried forward of——

Mr. Nesbett: Your Honor, I have no doubt, maybe that it is a bona fide statement, but I don't think it should be read until——

The Court: No.

Q. You received this in the regular course of the mails; who did you receive it from?

A. Well, it was mailed, while the address shows Box 2200, Anchorage, Alaska, it was actually mailed from the office in Everett.

Court: Is there objection?

Mr. Nesbett: May I ask Mr. Stephenson a question? [69]

The Court: Yes.

### Cross Examination

Q. (By Mr. Nesbett): Are these pencil compilations yours, Mr. Stephenson?           A. Yes.

Mr. Nesbett: I suppose you will tie those in with the testimony to follow, is that it?

Court: Can the pencil notes be easily erased?

Mr. Hughes: They could be.

Mr. Nesbett: I have no objection, then.

Court: If there are any pencil notes, ladies and

(Testimony of A. W. Stephenson.)

gentlemen of the jury, they will be disregarded because Mr. Stephenson says he made them and they are not a part of the paper he received from the company's office in Everett, Washington. It may be admitted with that statement, marked Plaintiff's Exhibit 8, and may be read.

Clerk: Statement dated April 30, 1951.

Court: Perhaps the clerk can erase the pencil notes, then that won't confuse the jury.

Mr. Hughes: I would like to waive reading this at this time if it is agreeable.

Q. I would like to have you refer to Exhibit 8, Mr. Stephenson, and tell us, if you will, the balance stated thereon—the credit balance, or debit balance, as the case may be.

A. The debit balance, dated April 30, was a balance of \$3,960.58. [70]

Mr. Nesbett: Three thousand?

Q. Would you read that again, please?

A. Debit balance of \$3,960.58.

Q. And you received this statement some time in May, is that correct?      A. Correct.

Q. And were there any credits shown on that statement?

A. No, there were no items of any credits whatsoever. The statement continues to show entries of April 30 of additional debits of \$700.00, \$200.00, and \$100.00, all of that date.

Q. Do you recall what those entries were set up for?

(Testimony of A. W. Stephenson.)

A. They were apparently for expense advance checks.

Q. Now, had you, prior to that time, submitted any vouchers that were not credited to you?

A. I had no way of knowing what credits had been given me.

Q. And why didn't you know?

A. Because none showed on the statement whatsoever.

Q. Well, am I to understand that your first statement was that you had or had not vouchers submitted that were not shown there?

A. So far as I could tell; I had no information as to the debits or the credits to bring this balance carried forward of \$3,960.58.

Q. Did you continue to receive statements such as these?      A. I did. [71]

Q. Through the entire period of your employment?      A. Through May, June and July.

Q. Do you have those statements with you?

A. I have.

Q. Were they received by you from Alaska Airlines?      A. They were.

Q. Was the receipt of them any different than the first one, in respect to transmittal?

A. No.

Mr. Hughes: I would like to offer those other statements.

Court: Very well; show them to counsel for defendant. Are there some pencil notations—

Mr. Stephenson: Yes.

(Testimony of A. W. Stephenson.)

Court: Were the pencil notations made by you after you received them?

Mr. Stephenson: That's right.

Court: They were not on when you received them?

Mr. Stephenson: No.

Court: If this is admitted the jury will disregard the pencil notations.

Mr. Nesbett: We have no objection.

Court: They may be admitted, marked Plaintiff's Exhibit 9, and may be read to the jury.

Mr. Hughes: I would like to stipulate at this time that I refrain—[72]

Court: Without objection the exhibit can be considered as read and referred to later by counsel in argument, or at any other time.

Q. Now, Mr. Stephenson, you received Exhibits 8, 9, and 10, for April, May, June and July of 1951, is that correct?

Court: Did counsel refer to Exhibit 10?

Mr. Nesbett: Is it all one exhibit?

Court: The last one covered May, June and July, I presume.

Clerk: Yes; statement of account for May, June and July, 1951.

Court: That is Exhibit 9.

A. They were received some time after the dates of the statements, through the mail.

Q. Did you, after July, receive similar statements until the time you were dismissed?

(Testimony of A. W. Stephenson.)

A. Not after July, no; not after the July 31st statement.

Q. I see. Now, did you continue, then, to incur expenses on behalf of the company in this respect, in connection with the furtherance of your employer's business? A. During this period, yes.

Q. And following July you did likewise?

A. Right.

Q. And did you make any effort to take any steps to straighten out your accounting with the company?

A. I asked the Accounting Department to give me a statement of [73] debits and credits of my accounts as they ought to, and I finally received one, which is Exhibit 6, on the 19th of September.

Q. Was the statement of September 11th, that is Exhibit 6, accepted by you as true and correct?

A. It was—no, it wasn't accepted as true and correct.

Q. Well, did you make any objection to it?

A. I made no objection to it. I said that I would take it and check it against my records and see whether it was a correct statement so far as I was concerned.

Q. Well, now, when you checked Exhibit 6 what did you find? Was it in conformance to your records?

A. It, insofar as the statement of debits and credits on travelling expenses, also included charges against me for moving expenses incidental to moving, and also concerned the items of my salary account, and also many advances to me for paying

(Testimony of A. W. Stephenson.)

bills on the preview flight of July 18th or July 22nd to 24th, or about that time.

Court: What flight?

Mr. Stephenson: Preview flight.

Q. Well, did you—will you refer to Exhibit 6, Mr. Stephenson, and starting at the top there—on October 30, 1950—will you explain whether or not any difference occurred there—is there any entry there that was not in conformance to your records, item by item?

A. The first entry that was not in conformance to my records [74] was an item dated December 29, 1950, Voucher 12-318, \$219.36, debit labelled Fare to Chicago.

Q. How did that vary with your records?

A. Because it showed that I was being charged for a ticket for transportation while on company business.

Q. Had you submitted a voucher on that?

A. Yes; I had submitted a voucher.

Q. Well, what should have been the entry, then, so far as your records disclosed?

A. I shouldn't have been charged for airplane fare for travelling on company business.

Q. Well, do you mean to say it shouldn't show as a debit?

A. That's right; that was my understanding at the time, because I had no information as to accounting methods, as to how they set up—or why they would charge me for a ticket travelling on company business.

(Testimony of A. W. Stephenson.)

Q. Well, if it likewise showed as a credit in the same amount, would that have been correct?

A. That would have been correct; however, I had not filed such a voucher in such an amount. The company had bought, procured, a ticket on a transportation request, I believe. I hadn't spent the money and consequently I hadn't charged the company for it; yet they had charged me for it. This was afterwards—on September 19th Mr. Fink explained to me that he had changed, or someone in the Accounting Department [75] had changed my voucher over my signature to make this correction and give me this credit.

Q. Well, the matter was ultimately straightened out?

A. It was ultimately straightened out when I was shown that they had changed my voucher to show this transaction.

Q. All right, now; what is the next item in Exhibit 6 that you know is in error, if any?

A. Well, dated March 30, 1951, Voucher 1-514, New York check for moving, \$1,500.00. This had no place in this accounting because the final determination of moving and expense incidental to that had never been completed and it didn't belong in a travelling expense charge of any kind.

Q. Did you in fact draw a check for that amount?

A. Mr. Marshall gave me a check for that amount in New York.



(Testimony of A. W. Stephenson.)

Q. Well, according to your records, how did you have this item entered?

A. I had it charged against my expense of moving, an additional expense to which I had been put waiting for determination as to where I would be based.

Q. If this voucher of \$1,500.00 showed a credit in the same amount, would that correct it?

A. That would take it out of this account, yes.

Q. Was that item ever squared around, or removed from your debit balance?

A. No; this is the only statement that I have ever received [76] from the company, or the last statement I received.

Q. What's the next item you find at variance to your accounting?

A. Voucher dated February 28, 1951, Voucher 12-524, \$700.00, Check No. 4511, Advance for Moving—\$700.00.

Q. And who issued that check?

A. That was issued—from the check number it would seem to me that it was issued in Anchorage.

Q. Well, now, what was the arrangement in regard to moving, as far as these expenses go, Mr. Stephenson?

A. Originally, in September in discussing the move with Mr. Marshall, my guess was that it would cost me \$2,600.00 to break up the home in Los Angeles and move to Anchorage. When I talked to Mr. Marshall on January 6th, he asked me not to make

(Testimony of A. W. Stephenson.)

a permanent move to Anchorage—to bring up my family—and advised me that the company would reimburse me for additional expense I went to until a final base was determined as to whether it would be Anchorage or possibly Seattle, and agreed that I should not sell my home in Los Angeles until such time as I knew where I should be stationed and could then buy a home.

Q. Well, then, when this \$700.00 check was issued, Mr. Sephenson, was that one that you wrote yourself, or one that was issued by——

A. Well, it was issued in the Anchorage office and if it was, it was signed by Mrs. Brislaw and myself. [77]

Q. Well, did you take this advance of \$2,600.00, that you speculated?

Court: Did you what?

Q. You stated that you estimated it would cost you \$2,600.00, is that correct, to make this move?

A. That is correct.

Q. Well, did you make the move?

A. I brought—as Mr. Marshall requested I closed up the home in Los Angeles and brought the family to Anchorage.

Q. Well, was this \$700.00 draft, or check, issued in defraying some of that expense?

A. Right.

Q. Now, then, what other item, if any, in here did you find to be at variance with your accounting?

A. As I said before, the April credits, I figured, had no place in this accounting, and also money

(Testimony of A. W. Stephenson.)

advanced to pay bills for the preview flight, of \$1,250.00.

Q. That is for what?

A. The preview flight.

Q. Did you submit vouchers on that?

A. Yes.

Q. When did you submit them?

A. They were—some of the vouchers were submitted on the 19th of September.

Q. Were they submitted on or before September 19th? [78]

A. Yes, except the vouchers were not submitted for the moving and the additional expense that I was caused.

Q. But in regards to the preview flight, the vouchers on that were submitted at what time?

A. The vouchers that were submitted for it, or the money that was spent on that was shown in vouchers submitted September 19th.

Q. All of it?           A. Not all of it, no.

Q. Were there some submitted prior to that time?

A. No; not prior to that time, because those vouchers included statements from February 11th to August 11th.

Q. Now, then, will you please explain just what you mean by this preview flight?

A. It was a flight before the scheduled operations started, carrying officials and Chamber of Commerce members and business representatives from the States to Alaska for a trip through Alaska

(Testimony of A. W. Stephenson.)

and return to the States. There was some Alaskans carried on the flight in Alaska, and I believe Governor Gruening returned all the way with us to Seattle. It was for the purpose of announcing the opening of our service to Alaska.

Q. Well, was it in the nature of a publicity campaign?           A. That's right.

Q. Now, were there any other charges debited against your [79] account in connection with the preview flight that aren't shown here?

A. No.

Q. Now, you have mentioned four items, exclusive of the payroll credit, or the payroll items—is there anything else that you found to be in variance with your account in this sheet of September 11th?

A. Well, there's a \$2,600.00 moving and incidental expense. The \$1,250.00 preview flight and the two payroll entries that did not belong in a statement of charges against travelling expenses.

Q. Did you say \$2,600.00 moving expense?

A. Right.

Q. And did you neglect to call one of those items to my attention?

A. Yes, a \$400.00 item, Voucher 6-478, check No. 4343, expense advance moving.

Q. Now, then, you have three items of moving expenses there totalling \$2,600.00; did you submit any vouchers on that, or corroboration?

A: No; on September 19th I did not submit

(Testimony of A. W. Stephenson.)

vouchers. I gave Mr. McMahon a statement of what the expense had been, up and to September 1st.

Q. And do you have a copy of that statement?

A. No, I don't have it here. I can give the total of it. It was [80] \$3,124.00 and some cents.

Q. \$3,120.00 what?

A. \$3,124.48, I believe.

Q. Well, now, did you or did you not have any discussion with any agent or officer of the company at the time you exchanged accountings on the 19th day of September, 1951?

A. I did; I advised Mr. McMahon that that was my expense at that time; that final settlement as to what I was to do would affect the balance—any additional costs.

Q. Now, at the time that this statement was issued—that is, the statement of September 11, 1951, did you at that time have any wages earned that had not been paid to you?

A. I had not been paid since July of 1951.

Q. Was any explanation given to you by the company why you were not being paid?

A. Not by Mr. Fink or Mr. McMahon.

Q. Was there at any time during the interim period, any explanation?           A. No.

Q. Well, did you inquire why you weren't paid?

A. I asked for my pay checks on several occasions.

Q. Who did you ask?

A. I asked Mr. Marshall, Mr. Baruth, Mr. Mael.

(Testimony of A. W. Stephenson.)

Q. Well, when do you recall you asked Mr. Marshall?

A. Several times during the course of the annual stockholders' [81] meeting—

Q. What was the approximate period?

A. 28th of August to the 19th of September, 18th of September—and once in Everett about the 8th of August.

Q. That is when you asked Mr. Marshall—the 8th of August in Everett?

A. No; that isn't correct. No, there was no discussion in Everett concerning the August pay checks.

Q. Well, what did Mr. Marshall tell you, if you recall?

A. Mr. Marshall said he wanted us to get together and come to an accord on the expense accounts, and I asked that I be given a statement; I told him I had been ready for months to submit vouchers and support for them, and that at any time that he would produce a statement, I would be willing—I would be ready to submit vouchers and claims.

Q. Well, when did you have a discussion with Mr. Baruth in this respect?

A. With Mr. Baruth and Mr. Marshall about the 8th or 9th of August.

Court: The Court will stand in recess for ten minutes.

Whereupon the court recessed from 11:00 o'clock, a.m., until 11:10 o'clock, a.m., at which time the following proceedings were had:

(Testimony of A. W. Stephenson.)

Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination. [82]

Q. (By Mr. Hughes): I believe you were testifying in regard to a statement, or discussion with Mr. Baruth; who is Mr. Baruth?

A. He is Assistant Treasurer of Alaska Airlines.

Q. Where is his office?

A. In Seattle, or Everett.

Q. Now, will you state again the date that you discussed the statement of September 11, 1951, or your affairs, with him?

A. I never discussed the statement of September 11 with him. On about September 8th, with Mr. Baruth and Mr. Marshall, I asked for an itemized statement of my account.

Q. And just state what Mr. Baruth said, please.

A. He brought the bookkeeping machine—the ledger sheet—into the office where Mr. Marshall and I were, and showed it to us.

Q. Well, did you discuss the matter further?

A. Yes; I objected to some entries, some charges against—some debits—and Mr. Baruth stated yes, that they were incorrect and that they would be checked and corrected, and we made an arrangement—said that we would get together in the next day or so and check the statement and go over the statement as they had it at the Treasury Department.

Q. And did you have a future meeting?

(Testimony of A. W. Stephenson.)

A. This was on about Tuesday or Wednesday, and on Thursday I went back to the office to check with Mr. Baruth on this statement and he wasn't there that day at all; they said [83] he was in Tacoma. On Friday I went into the office again to check with him on it and he was out; he had gone to town and wouldn't be back for two or three hours, and I had business in Seattle—we were preparing for the start of our schedule, and I couldn't wait longer that day. On Saturday I went to the field and found that the long distance operator, overseas operator, was trying to contact me on a call from Anchorage. I was advised that the CAA had asked that we postpone inaugurating our service for a few days until further study could be made by us—a certain technical requirement that they set up—could be complied with, and asked that I come to Anchorage to do this, so I contacted Mr. Marshall and advised him of the new matter and he suggested that Mr. Sanderson go along with me, so we came to Anchorage.

Q. Now, what was the date of the commencement of this series of incidents that you have just related?

A. The week ending Sunday the 12th of August, 1951.

Q. Well, it was, then, about August 8th that it commenced, is that right?

A. That's right; about August 8th.

Q. I thought you said September 8th just before you started; if you said September 8th, you



(Testimony of A. W. Stephenson.)

didn't intend to, is that correct?

A. No; that was in August. [84]

Q. Now, then, was there any further discussion between yourself and any officer of the Alaska Airlines in regard to your wages, between August 8th and the series of incidents ending August 12th, and September 19th, of which you have not advised us?

A. Yes; about August 23rd, I had remained in Anchorage and we had started the scheduled operation on the 17th or 18th, and I had remained in Anchorage. Mr. Marshall came to Anchorage on about the 22nd and then I don't remember the dates of the conversation. I suggested at one time that I go to Everett and get together with the Accounting Department and submit the vouchers and get a statement from them as to what debits and credits had been made against my account. Either Mr. Marshall or someone from the company assured me that they would have the statement brought up to Anchorage and I wouldn't need to go down. This was during the last week in August, and the statement finally—Mr. Fink finally brought the statement up on the 19th of September; he came up on the 18th, I believe.

Q. And that is the statement as shown in Exhibit 6, then?      A. That's right.

Q. Now, then, did you submit your vouchers?

A. I did.

Q. And for what period and when did you submit your vouchers?

(Testimony of A. W. Stephenson.)

A. I submitted them on September 19th. [85]

Q. And covering what period?

A. February 11th to August 11th.

Q. And to whom did you submit them?

A. Mr. Fink.

Q. What is Mr. Fink's capacity?

A. He's in the Accounting Department of Alaska Airlines.

Q. And was there anybody else present?

A. Mr. McMahan was present.

Q. And do you have any evidence of having submitted those vouchers?

A. Yes; I have a receipt from Mr. Fink.

Q. I show you this document and ask you if you recognize it, sir?      A. I do.

Q. And whose signature appears thereon?

A. Mr. Fink's.

Q. And is that the instrument to which you just made reference?      A. That's right.

Q. And that was signed on what date?

A. September 19, 1951.

Mr. Nesbett: We have no objection.

Court: It may be admitted, marked Plaintiff's Exhibit 10, and may be read to the jury.

Mr. Hughes: I would like to stipulate that it not be read at this time.

Mr. Nesbett: That's agreeable to me. [86]

Court: Without objection it is agreed that the exhibit need not be read at this time; it may be referred to later during argument or at any other time during the trial.

(Testimony of A. W. Stephenson.)

Q. Now, Mr. Stephenson, referring to Exhibit No. 10, will you please state what that purports to be?

A. It is a recapitulation of the expense statements submitted on September 19th by myself.

Q. And will you state the total there, as shown on that exhibit?

A. \$4,828.89.

Q. Was that, to your knowledge, a correct figure?

A. Mr. Fink prepared this and made the addition; later there was some correction in addition and apparently one voucher was recorded wrong on here, and the final total, the audit total of these was some \$90.00 less.

Q. Than as shown on Exhibit 10, is that correct?      A. Yes, that's right.

Q. Now, what was it that you submitted to Mr. Fink at the time of getting this statement, or this document?

A. The weekly expense vouchers with the hotel bills and transportation, or ticket stubs for the transportation, and other receipts.

Q. Well, now, were these receipts, to your knowledge, compiled in the ordinary course, and according to instructions?      A. That's right.

Q. Do you know whether or not the vouchers were compiled [87] according to Exhibit 7?

A. That's right; they were.

Q. And did Mr. Fink at that time take any exception to your offer of your vouchers?

(Testimony of A. W. Stephenson.)

A. No, he did not.

Q. What was the conversation, if any?

A. That he would take them to Seattle and to Mr. Marshall, and have me credited—my account credited for them.

Q. Now, did this set of vouchers include your expense in connection with the preview flight?

A. There might have been some meals charged on the vouchers that were a part of the preview flight expense.

Q. You say there might have been some meals?

A. Yes.

Q. That were not allowed?

A. That were on those vouchers.

Q. I see. Well, now, did you receive a credit for the adjusted figure on the vouchers as shown in Exhibit 10?           A. No.

Q. Did you receive any credit for that?

A. I am unable to determine from correspondence received since this suit has been filed, as to what credits were actually given me.

Q. Now, then, Mr. Stephenson, referring back to Exhibit No. 6, do you contend that all of the debits as shown on Exhibit [88] 6 are inaccurate?

A. May I see Exhibit 6? I have no complaint with the debits, except that the matter of intermingling the pay account, travelling expense account, and the moving and expense account all into one account and not being able to determine, except by separating it, as to what was due either one on each separate account.

(Testimony of A. W. Stephenson.)

Q. Calling your attention to Exhibit 6, the item of \$1,250.00 labelled in connection with the preview flight, now, referring to Exhibit No. 10, do you show a like expenditure to cover that debit?

A. No; there are some expenditures in this that were caused by the preview flight. Now, I believe in the period between July 22nd and July 28th there was one expenditure that should have been preview flight expenditure, of some \$211.00 for meals for the guests at King Salmon, and also some meals at Seattle.

Q. Well, do you contend that the item of \$1,250.00 was all expenses of the preview flight?

A. No; it was charged to me for that, but I do not contend that I spent all of that on the preview flight.

Q. Well, how do you establish that you did not?

A. Well, just on my memory as to the items that were chargeable to the preview flight. There was another item charged to me, of some \$47.73 for a ticket from Naknek to Anchorage for a [89] Mr. Curry. I don't know without checking the exact dates on the vouchers just what other meals there might be for the guests on the preview flight.

Q. Will you please state as near as you can recall right now what you did with the \$1,250.00 as shown here in this debit memo?

A. An expense possibly of \$300.00 or \$400.00—possibly \$300.00; I kept the rest of the money in my account. The \$1,250.00 check issued to me was

(Testimony of A. W. Stephenson.)

deposited to my account here in the Union Bank of Anchorage.

Q. And was this during the time that you were not receiving pay checks? A. Yes.

Q. Will you concede, then, that there is a credit due the company of a substantial part of that?

A. Right.

Q. Is that same thing true of some of these other debit balances?

A. I don't concede that there is anything due the company when I am given credit for my expenditures.

Q. Now, then, Mr. Stephenson, in your complaint you state that there is certain expenses, or certain monies due and owing you for moving expenses. Now, how much money did you state that you had now received for moving expenses, up to this point in your testimony?

A. \$2,600.00. [90]

Q. Now, what is the total credit, according to your figures, that should be allowed you for moving expenses?

A. Moving, and additional expense incidental to it—\$4,072.06.

Q. Now, does that figure include the \$2,600.00 that you have already testified that you have received?

A. That would be deducted, correct.

Q. The difference between the two would be what you have coming? A. Right.

Q. Now, how do you establish the figure of

(Testimony of A. W. Stephenson.)

\$4,072.06 as the cost of moving, Mr. Stephenson?

A. First,  $1\frac{1}{2}$  air fares from Los Angeles to Seattle, for the wife and boy, \$98.00; second,  $2\frac{1}{2}$  fares Seattle to Anchorage, \$211.40; hotel and meals in Seattle, \$196.55; winter equipment, clothing, \$130.09; auto expenses, \$46.35; hotel, meals and expenses at Anchorage \$302.10; the cost of moving and incidental to it, \$371.25; rental costs in Anchorage, \$2,165.25; the return fares to Los Angeles, now that I am terminated—full fare to Seattle \$103.50; another full fare to Seattle, \$103.50; half fare, \$60.36; Seattle to Los Angeles, \$73.09, one full fare; another full fare, \$73.09; half fare, \$36.55; air freight \$26.25, transportation for the dog.

Q. Well, now, Mr. Stephenson, do you have any vouchers on the first item you just mentioned—that is, for fare from Los Angeles to Seattle—by the way, is that half fare, who is that for?

A. My son; seven year old son. [91]

Q. And do you have any—

A. I do not have those two vouchers, and the figure of \$98.00 is apparently less than what it was, because the full fare is \$73.09 and a half fare is \$36.55, which would be a total of \$109.64 instead of \$98.00.

Q. But you do not have a voucher on that, is that right?      A. I do not have, no.

Q. Do you have a voucher for the  $2\frac{1}{2}$  fares from Seattle to Anchorage?

A. I do; I have the tickets.

Q. And on what date were those tickets issued?

(Testimony of A. W. Stephenson.)

A. The 12th of January, 1951.

Q. Do you have any vouchers for the expenditure mentioned of \$196.55, hotel and meals in Seattle?

A. Yes; hotel bills there totalling some \$84.00, I believe, or \$94.00.

Q. You can refer to these first, if you want to.

A. Total of \$84.91 for hotel bills.

Q. How long were you in Seattle, Mr. Stephenson?      A. About five or six days.

Q. And did you go to Los Angeles to pick up your family?

A. No; I met them in Seattle.

Q. And what do you have by way of support for your meals, then?

A. I don't have any support for that.

Q. Well, how did you calculate that? [92]

A. By keeping a record, or making a note from day to day of how much I spent for meals for the family.

Q. Was there any entertainment involved in that?      A. No.

Q. Well, then, the difference between \$84.91 and \$196.55 is your actual expenses for meals for you and your family in Seattle on your route up here, is that correct?      A. That's right.

Q. You mentioned next that you had some winter equipment and clothing; now, what did that consist of?

A. Well, that was heavy coat, overshoes, for the wife and boy.



(Testimony of A. W. Stephenson.)

Q. Do you have any statement on that?

A. No; Mrs. Stephenson did those purchases and I didn't get a receipt from her.

Q. Your next item you mentioned was \$46.35 for auto expenses; do you have a voucher for that, sir?

A. Yes, I have.

Q. And was this likewise for the week of January 12, 1951?

A. That's right; it was from the 8th to the 11th.

Q. The next item that you mentioned was hotel, meals and expenses in Anchorage; during what period was that?

A. January and February.

Q. Of what year?           A. 1951.

Q. And what have you to corroborate that figure of \$302.10? [93]

A. I don't have the \$302.10, and the next item \$371.25—broken down, I have cancelled checks in the amount of \$719.10.

Q. How did you arrive at these two figures, then—the two that you mentioned—hotel in Anchorage, January and February, 1951, \$302.10, and the next item—

A. Because some of that expense was my own that wouldn't have been incidental to the moving—my own expense.

Q. So that your total expenses, then, for that period were something in excess of \$700.00, and you charged \$673.35 to the Alaska Airlines, is that correct?

A. That's right.

Q. Now, do you have any vouchers for that sec-

(Testimony of A. W. Stephenson.)

ond item—did you say you didn't have—that cost of moving from Los Angeles to Anchorage?

A. I said those two items I had the vouchers combined on those.

Q. Now, the next item you mentioned was excess cost in Anchorage to October 15, 1951; how, how did you establish the figure of \$2165.25?

A. By taking and checking the expenditures and figuring the expenditures that were incidental and necessitated by my living in Anchorage.

Q. In computing that figure, just what did you charge to Alaska Airlines?

A. Rent here in Anchorage and the cost of caretaker for the home in Los Angeles. [94]

Q. How much did it cost you for the caretaker for the home in Los Angeles?      A. \$165.00.

Q. For the entire period?

A. For the entire period.

Q. And what was your rental here in Anchorage for the period to October 15, 1951?

A. Rental was \$2,000.00.

Q. Did you have any additional expenses in connection with you home in Los Angeles, that were not charged?

A. Yes; it cost me about \$169.94 and \$31.94 per month.

Q. Well, that is the cost of financing your home down there, isn't it.      A. Right.

Q. Did that enter into your charges against Alaska Airlines in any way?      A. No.

Mr. Nesbett: Could I get those figures?

(Testimony of A. W. Stephenson.)

Mr. Stephenson: \$169.94 and \$31.94.

Q. Now, those were monthly charges on your home in California, is that right? A. Right.

Q. Well, that is in the nature of a capital investment, isn't it, Mr. Stephenson? A. Right.

Q. Now, do you have any proof of, or vouchers, for your expenses, then, charged in this particular regard—you called it your excess cost of living in Anchorage, to October 15, 1951?

A. Yes; I have the cancelled checks.

Q. Then, Mr. Stephenson, the balance of your costs are estimated costs, is that right—when you say a return ticket—

A. Yes; those are; they are estimates; they are based on air fares as they are today.

Q. Well, now, may I just see those vouchers you say you have supporting this item of moving—may I see the group of them that you mentioned as having in support of your—first the items prior to the \$2,165.00 item—that is, your hotel bills while in Seattle and your plane fare tickets and so on; is this the— A. Auto charge.

Q. That is your auto charge?

A. That's right; the rental charge, \$44.73, and the storage, \$1.75.

Q. Now, are these all vouchers you got prior to your arrival in Anchorage in September—of your expenses? A. Yes, that's right.

Mr. Nesbett: Could I ask Mr. Stephenson one question, Your Honor?

Court: Yes. [96]

(Testimony of A. W. Stephenson.)

Cross Examination

Q. (By Mr. Nesbett): I notice one bill here marked March 1st, Mr. Stephenson—Westward Hotel. A. Right.

Q. Is that——

A. That's when we were in the process of getting into a home.

Q. And there were prior Westward bills, prior to this?

A. Right; perhaps, in proper answer to Mr. Hughes' question those were incurred after arrival in Anchorage; the Westward bills.

Mr. Nesbett: No objection.

Court: Without objection the exhibits may be considered as read and they may be referred to by counsel at any time, in argument or at any other time in the trial. They will be collectively marked Plaintiff's Exhibit 11.

Direct Examination—(Continued)

Q. (By Mr. Hughes): Now, Mr. Stephenson, in regard to your expenses while in Anchorage and before you got situated in your home, do you have any supporting vouchers in that respect, or checks?

A. Yes; I have cancelled checks.

Q. Well, are these the checks that you mentioned in your testimony as being about \$700.00 plus, that you charged only \$600.00, or something like that? A. Right. [97]

Q. Could I see those, please, sir? Is this included in there, these two checks?

(Testimony of A. W. Stephenson.)

A. That's right.

Q. This is for the period, then, of January and February of 1951?           A. That's right.

Mr. Nesbett: We have no objection.

Court: They may be admitted in evidence, marked Plaintiff's Exhibit 12, collectively, and without objection will be considered as read and may be read or referred to at any time by either counsel during the trial. I think we will suspend now. Court will stand in recess until 2:00.

Whereupon, at 11:57 o'clock, a.m., the court duly admonished the jury, and the trial of the above-entitled cause was continued until 2:00 o'clock, p.m.

Be It Further Remembered, That at 2:00 o'clock p.m., on the 13th day of March, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding;

And Thereupon, the following proceedings were had:

Court: The witness may resume the stand; counsel may proceed with examination.

Q. (By Mr. Hughes): [98] Mr. Stephenson, do you have any vouchers, or proof of payment, of the item which you testified was the excess costs in Anchorage to October 15, 1951, in the amount of \$2,165.25?           A. Yes, I have.

(Testimony of A. W. Stephenson.)

Q. And what form does this take?

A. Cancelled checks.

Q. And what do these checks represent, then, sir?

A. They represent rental in Anchorage and caretaker at Los Angeles.

Q. Do you have them there with you?

A. Yes.

Mr. Hughes: I would like to offer these as one exhibit.

Mr. Nesbett: We have no objection.

Court: They may be admitted and marked Plaintiff's Exhibit 13. Without objection they will be considered as read, with the usual provision that they may be referred to at any time during the trial. These are all checks?

Clerk: Yes.

Q. I believe you testified that your expenses of return to California were estimated, is that correct?      A. That is correct.

Q. Now, Mr. Stephenson, have you got any other invoices which you have not heretofore turned in to the company which should be allowed as credit to you?      A. Yes, I have.

Q. What are those invoices? [99]

A. Invoice for \$47.73—

Q. And will you please explain how you happen to have this invoice?

A. It was a matter of returning a press representative on a scheduled airline from King Salmon to Anchorage—one who was not going on with the preview flight.

(Testimony of A. W. Stephenson.)

Q. How did it happen that you paid that?

A. He couldn't be issued a pass under the Civil Air Regulations except for travel on the preview flight. It was the company's obligation to return him to Anchorage, and the only procedure would be for the ticket to be charged to me and charged in the company accounting as publicity.

Q. And has this invoice been charged off in any other respect—credited to your account?

A. I have no information except the invoice itself.

Q. Has it ever been submitted?

A. It is an invoice to me.

Q. Oh, I see. And, then, as a result of this operation of transferring this passenger back from King Salmon to Anchorage, the company charged you, is that right?       A. That's right.

Q. Was this person in any way connected with you personally?

A. No; I don't even know the gentleman.

Court: Is it desired to put the invoice in evidence?

Mr. Hughes: I would like to offer it. [100]

Court: It may be shown to counsel.

Mr. Nesbett: No objection.

Court: It may be admitted in evidence, marked Plaintiff's Exhibit 14, and may be considered as read under the usual circumstances.

Q. Mr. Stephenson, are there any other items of company expense for which you have not been credited that you have not heretofore mentioned?

(Testimony of A. W. Stephenson.)

A. No; I don't recall any.

Q. Have you had occasion to prepare a statement of your costs involved in moving?

A. That's right; I have.

Q. Do you have such a copy with you?

A. I have it on the desk there.

Q. I ask you if you recognize this document?

A. I do.

Q. Did you prepare that?

A. I prepared a pencil copy of it and had it typed.

Q. Well, is that an exact copy of the one that you made up in your own handwriting?

A. That's right, I have compared it; it is.

Mr. Hughes: I would like to offer this as illustrative of the testimony of the plaintiff.

Court: Let me ask a question. Is this statement in harmony with the testimony you gave this morning regarding the [101] expenses?

Mr. Stephenson: Right.

Court: Very well; it may be shown to counsel. I think a copy should be furnished to counsel for the defendant, also, if it goes in evidence. If it does not, then there is no occasion for it.

Mr. Nesbett: We have no objection, Your Honor.

Court: It may go in. Ladies and gentlemen of the jury, this paper now going in as Plaintiff's Exhibit 15 is given to illustrate the testimony of the witness. We admit papers sometimes to illustrate testimony, because it is virtually impossible for a judge or jury to remember detailed figures; so, if you have the paper when you go to the jury, re-



(Testimony of A. W. Stephenson.)

member to consider this—you can refer to it as a summary of what the witness testified to. In itself it is not evidence like a book of account would be evidence, kept at the time, but it illustrates the testimony of the witness and it is therefore admissible, and the defendant does not object to its admission for that purpose. Counsel may proceed.

### PLAINTIFF'S EXHIBIT NO. 15

#### Moving and Additional Expense Incurred by Living in Anchorage, Mar. 12, 1952

|  |         |
|--|---------|
| One and 1/2 fares Los Angeles to Seattle ..                    | 98.00   |
| Two and 1/2 fares Seattle to Anchorage ....                    | 211.40  |
| Hotel and meals Seattle .....                                  | 196.55  |
| Winter equipment (clothing) .....                              | 130.09  |
| Auto expense .....   | 46.35   |
| Hotel, meals & expenses Anchorage,<br>Jan. & Feb., 1951 .....  | 302.10  |
| Cost of moving preparations, Los Angeles<br>to Anchorage ..... | 371.25  |
| Excess costs in Anchorage to Oct. 15, 1951                     | 2165.25 |
| Invoice 8/31/51 .....  | 47.73   |
| Telephone June .....   | 27.00   |
| Return fares Anchorage to Seattle .....                        | 103.50  |
| Return fares Anchorage to Seattle .....                        | 103.50  |
| Return fares Anchorage to Seattle .....                        | 60.36   |
| Return fares Seattle to Los Angeles .....                      | 73.09   |
| Return fares Seattle to Los Angeles .....                      | 73.09   |
| Return fares Seattle to Los Angeles .....                      | 36.55   |
| Return fares Air freight .....                                 | 26.25   |
|  | <hr/>   |
|  | 4072.06 |

(Testimony of A. W. Stephenson.)

Q. Now, Mr. Stephenson, in regards to your cost of moving and increased costs of living in Anchorage, how much of this do you say had been submitted to the company by way of statements?

A. \$3,124.00 and some cents; I believe it was 48 cents.

Q. And has the cost of your moving been in any way credited to your account, so far as you know?

A. Not to my knowledge.

Q. Now, did you have a definite arrangement with Mr. Marshall, or any other officer of the Alaska Airlines, Inc., in regard to the allowance of these increased costs?

Mr. Nesbett: Your Honor, I will object to that question. I think he should name the time and place and the name of the officer.

Court: Overruled; I think he can ask this preliminary question.

A. Yes, I did; with Mr. Marshall.

Q. And where was that agreement?

A. In New York, in September of 1950 and January of 1951 and March of 1951.

Q. Did Mr. Marshall advise you at any of the times stated as to how you should submit vouchers in this regard?

A. No; no instructions were given.

Q. Now, Mr. Stephenson, in regards to your salary, where was that salary fixed—at what place did you agree to that? A. In New York.

Q. And what was the date of that, if you recall?

A. September 18th or 19th.

(Testimony of A. W. Stephenson.)

Court: What year?

Mr. Stephenson: 1950.

Q. And who fixed that salary?

A. Mr. Marshall. [103]

Q. And will you please state what the conversation was between you and Mr. Marshall at the time it was fixed?

A. It was to be \$1,300.00 a month.

Q. Was this at the same time you discussed the increased costs of moving—living?

A. The principal discussion on the move and the increased cost to me was in January of 1951.

Q. Now, did Mr. Marshall establish you on the payroll himself? A. He did.

Q. Did Mr. Marshall issue any instructions, if you know, as to what your pay should be?

A. So far as I know, the only instructions that were given were \$1,300.00 a month.

Q. Did you, yourself, issue any instructions in regard to your own wages? A. I did not.

Q. Did you have any conversation with Mr. Marshall, after the time you were hired, in regard to modification of your pay?

A. Yes; once in January and then the next time either in March or April of 1951.

Q. Well, what was stated in January?

A. Mr. Marshall suggested that he set the salary at a thousand dollars a month and make \$300.00 expenses, and he said in that way I could effect a tax saving. I advised him that I didn't want to become involved in any tax problems, I never [104]

(Testimony of A. W. Stephenson.)

had had any, that I didn't want to have to account to the Bureau of Internal Revenue for expenses for a part of my salary.

Q. Did that close the discussion? A. Yes.

Q. Was that same discussion ever reopened between you and Mr. Marshall?

A. Yes, it was mentioned again, with the same conversation and the same results, in either March or April of 1951.

Q. Now, directing your attention to your first cause of action, in paragraph VII of your complaint, you state that you have been damaged, Mr. Stephenson, in the amount of \$22,900.00; will you state how you arrived at that figure?

A. That figure was arrived at based on the thinking, and my belief and conviction that I should be entitled to completion of two years of service with Alaska Airlines after March 15, 1951.

Q. Well, the figure that you ask here is something less than two years' salary, is it not, Mr. Stephenson?

A. That's right; giving the company credit for the salary for the portion of that two year period for which they paid me salary.

Court: That would be up until the 1st of August—or haven't you calculated——

Mr. Stephenson: Your Honor, I wasn't quite sure as to what [105] date I was to be paid, or how the company had computed my pay at that time. It was computed, I believe, about that date of the suit.

(Testimony of A. W. Stephenson.)

Court: All right; it is a matter of calculation.

Q. Now, then, Mr. Stephenson, in your allegation in your second cause of action, you state that you are entitled to \$273.24 by way of travel expenses from February 11, 1951 to August 4, 1951; is that figure subject to modification, if you know?

A. Yes, it could be; if there were charges of which I wasn't aware that were proper—but substantially it is correct.

Q. Do you at this time feel that you have a full knowledge of the credits and debits as shown, or as should be shown, by the books of the company?      A. No.

Q. In your second cause of action you likewise claim that there is \$792.48 that is due and owing you for moving and any additional costs incurred at the request of the Board of Directors of the defendant corporation; is that figure subject to modification?

A. Yes, it would be subject to modification if there were any errors.

Q. Is the same thing true, Mr. Stephenson, of the rest of your complaint?      A. Right.

Q. Have you had an opportunity to discuss the matter of accounting [106] with the Accounting Department of Alaska Airlines since the last statement rendered you on September 19th?

A. No.

Mr. Hughes: You may take the witness.

Court: Counsel for defendant may examine.

Mr. Nesbett: Your Honor, at this time I have a request to make of the Court and I feel that pos-

(Testimony of A. W. Stephenson.)

sibly it should be made out of the presence of the jury.

Court: The jury may retire to the anteroom for a few minutes.

(The jury retired from the court room.)

Mr. Nesbett: Your Honor, I don't know how fully you have checked into the law in connection with the motion that I made and argued yesterday morning; however, I would like to ask Your Honor's indulgence in the procedure to be followed in this case, in this respect—that without losing any privilege of cross examining Mr. Stephenson, and assuming that Mr. Hughes has no other witnesses, that I be permitted to argue a motion for a directed verdict at this time.

Court: At this time?

Mr. Nesbett: Yes, sir.

Court: Is this the only witness you have Mr. Hughes?

Mr. Hughes: In chief, this is the only witness.

Court: Very well; I think, upon that statement, a motion for an instructed verdict might be entertained by the Court now. [107]

Mr. Nesbett: Your Honor, this motion is directed only to the first cause of action. It is based upon the record as it exists, and in part upon the authorities that I cited to Your Honor yesterday morning. Now, particularly in view of the testimony upon that line of cases represented by one New York case that I submitted, holding that a promise to give

a written contract cannot be upheld under any stretch of the imagination or theory of law so far as the statute of frauds is concerned. Now, disregarding for a moment that phase of the law, I would like to examine again promissory estoppel, as argued by Mr. Hughes, and in connection with the direct testimony of Mr. Stephenson. That testimony, Your Honor, I tried to check very carefully in my notes; I checked them with Mr. Harper's last night after court, and it occurs to me that from Mr. Stephenson's own testimony, at the meeting in New York on March 16th or 17th of 1951, and assuming everything Mr. Stephenson says is the truth, the most he had from Mr. Marshall at that time was a promise that if and when Alaska Airlines received a certificate he would then go into the matter of a permanent arrangement with Mr. Stephenson. Now, as Your Honor well knows, promissory estoppel, and in cases as cited by Mr. Hughes, we have this situation—one person making a representation of fact, in fact promising a definite contract—in the Seymour case, a contract for ten years, to be overseer of an estate at \$300.00 per month; those terms were definite, and they were promised, and the promisee changed [108] his position in reliance on this promise, to his detriment; so they invoked promissory estoppel. Now, Your Honor, we haven't got that situation here at all because any promise upon which Mr. Stephenson intends to invoke this doctrine of promissory estoppel must have been made to Mr. Stephenson prior to March 18th, the date on which he lost all his tenure or status rights

with Western Airlines, because, Your Honor, after that date he had nothing to give up. Now, we have the testimony of Mr. Stephenson himself that all he received on March 16th or 17th, assuming everything he said was the truth, was a promise that if and when sometime in the future Alaska Airlines got a certificate, Mr. Marshall would then go into the matter of some permanent arrangement, or some sort of contract; they had differed on the period—Mr. Stephenson stated that he finally conceded two years; he wanted four. But we finally find him coming back in April wanting four years again, long after he lost his tenure and status rights with Western Airlines. Now, salary was by no means settled in this 16th and 17th conversation—March, I refer to. Mr. Stephenson had in mind an increase in salary over \$1,300.00 a month if he got the certificate—he even submitted a memorandum of contract, but no promise, other than if and when we get a certificate we will go into this matter of another arrangement of some kind. Your Honor, all this, as I see it, is a promise, if we consider it that strongly, on Mr. Marshall's part, that if sometime in the future Alaska Airlines [109] gets a contract, Mr. Stephenson, we'll consider your situation. In other words, a promise to discuss a contract, upon the pending of a future contingency. Now, that cannot possibly be reconciled with any of the cases that have applied the doctrine of promissory estoppel, Your Honor, and as I see this, my theory is that if a definite contract was in the minds of both these people, Mr. Stephenson and Mr. Marshall, on March



17th, and Mr. Marshall had made a promise, we would have a different situation; but you haven't got that, by Mr. Stephenson's own testimony. Now, we move to April 7th to 17th; it is my contention that promissory estoppel cannot be applied to any conversations on those dates; assume that it could—what has Mr. Stephenson got when he submitted his second proposed contract, one that was over two pages long, I forget the exhibit number, dated blank day of April? He admits himself that when he left New York he had nothing more than another promise from Mr. Marshall, we expect some time to get a certificate; if and when we do, we will go into this matter, Mr. Stephenson, and he didn't say, according to Mr. Stephenson's own testimony, "We will draw up some contract," but, "We will go into the matter." So Mr. Stephenson went back to Alaska. Now, he's lost all these rights; now, considering it as I see it, the doctrine of promissory estoppel is no longer applicable. Consider another phase—promise to make a written contract in the future—obviously, and under all the cases, Your Honor, that sort of a situation is not protected by any exception to the statute of frauds. One case I gave Your Honor yesterday morning dealt specifically with it in New York; this is in 49 American Jurisprudence, page 368; that's on the statute of frauds. It reads as follows: "While there are intimations to the contrary of the rule in a few scattered decisions, the general rule is that an oral agreement to reduce to writing a contract which is within the scope of the operation of the statute of

frauds, or to sign an agreement which the statute of frauds requires to be in writing, is invalid and unenforceable. Neither promise is enforceable unless the statute is satisfied. In other words, a parol agreement invalid under the statute is not aided by a further parol agreement to reduce the principal agreement to writing. To allow the enforcement of such an agreement would be tantamount to taking the main contract out of the statute, and as has been said it is absurd to say that an oral promise in relation to certain subject matter is invalid, but that a promise that the party will thereafter bind himself with respect to the subject matter is valid. Such a construction would be a palpable evasion of the statute, and let in all the evils against which it is directed." I haven't read all the paragraphs, Your Honor. I have two New York cases here and I will have to obtain the citations under which you can find them in the Law Library here for you by running them down in the library. The first one is *McLachlin v. Village of Whitehall*—

Court: I have read that.

Mr. Nesbett: You have? And the second one is the case of *Amburger v. Martin*—

Court: What reference?

Mr. Nesbett: That has a New York citation that is foreign to me—4th Edition something—this case *Deutch v. Textile Waste Merchandising Company* cited to Your Honor yesterday was the proper citation. You have read the two main cases. Now, Your Honor, my argument is that simple—

Court: I haven't read the *Amburger* case.

Mr. Nesbett: It says that an action cannot be maintained where there is a parol agreement to employ a person for a period of one year to the next, and to enter into a written contract for such employment, because such parol agreement was void under the statute of frauds. Now, my argument is that simple, Your Honor. I don't intend to bore you at all with matters I argued yesterday, and I think these citations from American Jurisprudence apply, because the testimony given by Mr. Stephenson shows conclusively that there never was anything other than a promise to enter into further discussions if, in the future, a certain contingency happened, and I urge Your Honor to apply the statute of frauds in a situation where obviously it was designed to be applied, and avoid having to go into long cross examination and records and trial in connection with this alleged contract. And if, Your Honor, this motion is granted, we would [112] like to move right now into the rest of the trial in connection with expenses.

Mr. Hughes: Your Honor, Mr. Nesbett, and Mr. Harper, the law as cited by Mr. Nesbett is sound, and can be admitted. The question, of course, is whether or not it applies to the facts of this case. And I will agree with Mr. Nesbett that whatever happened prior to March 18th of 1951 is the important factor—what took place between these two parties. Now, I think that Mr. Nesbett puts an interpretation on the testimony of Mr. Stephenson that is unwarranted, in that it was my understanding of the testimony of the plaintiff that there was

in fact a definite understanding and agreement that there was to be a contract for not less than two years, but that it might be more in the event of certification, and that question was asked Mr. Stephenson and he indicated that there was an agreement. That is, if the certificate was granted, wages might be increased, and the question of delaying the signing of the contract very likely depended upon, and not very likely from the testimony itself, depended upon where the certificate was granted, what would be the scope of the operation, as to the maximum salary, but certainly not as to the basic salary or as to the basic tenure, and when Mr. Nesbett says that from what the witness stated, and I think he stuck closely to the facts as he saw them and as they were stated to him by Mr. Marshall—the fact that this man went back there for the purpose of reaching an [113] understanding with Mr. Marshall and told him of the circumstances of the expiration of his leave time and he wanted his decision, should he stay with them or shouldn't he, and Mr. Marshall said yes, but hesitated to sign a contract at that time, not because they did not have a place for him, but that the exact terms, or the maximum salary was not to be determined until after certification. Now, I will admit that the contract, Exhibit 1, Plaintiff's Exhibit, does not have any practicable force in the inducement of Mr. Stephenson in the initial instance, but certainly that contract, written by the President of the corporation itself, indicates clearly to me that they had in mind a contract, and that there was no disagreement that they were to

have a contract. Possibly it was to be for a lesser period than has been indicated there as four years, but I hardly feel that the Court can discount and can at this time say that this was not such a representation or such an agreement to make a contract as would be within the statute, and I feel a prima facie case has been established and that would take it out of the statute, and, accordingly, urge the Court to hear out the matter and submit the case to the jury for their deliberation and if a special finding of fact is necessary, that might be helpful to the court.

Mr. Nesbett: Your Honor, aside from the statute of frauds, and speaking on the point Mr. Hughes has raised, it appears to me, from the testimony, that there wasn't the basis in the [114] evidence to even presume any contract, assuming there had been one, for the reason that the salary in the contracts and in the testimony varied from \$1,300.00 to \$1,500.00, or from \$18,000.00 a year to \$23,000.00 a year. We have almost five different figures discussed at one time or another, and after March 17th, by these parties. So the figure is in doubt. There's two years, four years. Secondly, now Mr. Hughes says yes, they had in mind a contract. What happened was Mr. Stephenson apparently had in mind a contract, but Mr. Marshall did not have in mind a contract, and even considering Mr. Stephenson's testimony most liberally in his favor, and assuming Mr. Marshall had a contract in mind, he wasn't going to do anything about it until the certificate was granted, and then and only then could they de-

termine how long he would give it to him, and so forth. So, Your Honor, I insist there is every reason in the world why a directed verdict should be granted with respect to the first cause of action, and I neglected to mention this main thing—the provisions of rule 41 and also rule 50.

Court: In my judgement there is enough to go to the jury under the Seymour doctrine, the Seymour case, if that should be applied. It may be that counsel agree that *Lex Loci Contractus* rule should be applied; that was my understanding from the argument yesterday. I know counsel for the defendant urged it and I was under the impression that counsel for plaintiff did not dissent from the argument, and therefore, I have made what [115] effort I could to find out the decisions of the courts of New York. The McLachlin case—I haven't a citation here, but it is cited in the case of *Kahn v. Cecelia Company*, 40 Federal Supplement, 878, which counsel for defendant cited yesterday; I think it is 99 New York Supplement, I don't remember the number of it—

Mr. Nesbett: 40 Federal Supplement, 878.

Court: McLachlin against the Village of Whitehall, and I think that is to be found in 99 New York Supplement—I'm not sure of it; at any rate, it is cited in the Kahn case. That, standing by itself, would indicate that the Seymour case is wrong. If the Seymour case is wrong, of course Mr. Stephenson has no standing here, but other decisions, other opinions, from the courts of New York throw a somewhat different light on the subject. I am

sorry, I did not anticipate this argument at this time and I failed to bring over the memorandum I had of other cases not cited by either counsel, which bear upon the question. So far as I have been able to find out, with the aid of the law secretary of the court, neither the Appellate Division of the Supreme Court of New York nor the Court of Appeals of New York has ruled directly upon the exact problem with which we are confronted here, that is, where the plaintiff claims to have acted seriously to his detriment relying upon the oral promise of another, the plaintiff having given up financial rights which were valuable to him, valuable from any standpoint by reason of [116] what he claims, what he asserts in his complaint, and what counsel for plaintiff says is maintained by his testimony—having given up those rights relying upon the oral promise. The New York Court of Appeals, to the best of my knowledge, has never declared upon the subject, and neither has the Appellate Division of the Supreme Court. I think the McLachlin case was a decision of the Supreme Court, one judge sitting—I am not exactly certain of that, but I believe it was—and there are declarations to be found in the various opinions coming from the Supreme Court of New York which indicate that the matter is still an open one there. Believing as I do that *lex loci* probably governs, I would feel constrained to follow whatever the New York courts have declared upon the subject. I think I would be bound to follow it, although there are no decisions holding that the rule of *lex fori* gov-

erns, in fact I believe American Jurisprudence says in one place that authorities are in hopeless conflict as to whether the *lex loci* rule or *les fori* rule should be followed. What counsel for defendant says is true; counsel for plaintiff admits that the promise to give an indefinite contract cannot be enforced in the face of the statute of frauds; if one man merely says "by and by we will have a written contract," without having anything specific in it, that is clearly out. I may have misconceived the testimony of the plaintiff, but as I listened, it seemed to me that he did give testimony sufficient to indicate that Mr. Marshall promised a [117] contract, promised that he would remain in the employ, and the only dispute was whether it was to be two years or four years, and there was no dissent from the two year proposition, in fact, that was Mr. Marshall's suggestion, two years, and the only question that arose was as to whether the salary should exceed \$1,300.00 a month, which was the current salary. To leave off as I began, I believe the plaintiff has, at the present moment, anyhow, I believe the plaintiff's testimony brings him within the scope of the opinion and decision in the Seymour case, and I believe further that there is nothing outside of this McLachlin case which was decided, as I recall, in 1906, there is nothing in the decisions of the Supreme Court of New York or the Court of Appeals of New York which forbids the application of the doctrine. The doctrine of promissory estoppel is not universally followed; I know we can find decisions supporting—I think I found them from a dozen states, per-



(Testimony of A. W. Stephenson.)

haps not quite that many—and while the question is still an open one, and before a final decision is made I shall check again upon the plaintiff's testimony, but at the present the motion must be denied, and it is denied, and therefore—I was going to say if counsel for defendant wishes to rest upon the showing that was made—I presume he will want to go into the question further, I don't know—it may be that counsel for defendant would be content to let the thing stand as it is and not make further contest on that point, standing on his views of the law. [118]

Mr. Nesbett: I wonder if we could have a fifteen minute recess to discuss that.

Court: Yes; the court will stand in recess for fifteen minutes.

Whereupon the Court recessed from 2:55 o'clock, p.m., until 3:08 o'clock, p.m., at which time the following proceedings were had:

The jury returned to the court room.

Court: The witness may resume the stand. Counsel for defendant may examine. You may take the stand, Mr. Stephenson. Mr. Nesbett——

#### Cross Examination

Q. (By Mr. Nesbett): Mr. Stephenson, would you state again how you arrived at that figure of \$22,900.00 set out in your complaint as damages with respect to your first cause of action?

A. It is the balance due on a two year tenure

(Testimony of A. W. Stephenson.)

of service at \$1,300.00 a month—approximately so. There was some question at the time the complaint was written as to just when I was terminated, or what period I was to be paid.

Q. Well, isn't it a fact that you took a certain number of months and multiplied it by \$1,300.00 to arrive at that figure?

A. A certain number of months, or fractions.

Q. Or fractions of a month?

A. And a fraction. [119]

Q. You don't recall the date from which you commenced to apply the \$1,300.00 a month, do you?

A. Not right now, I don't.

Q. Could you some time during the course of this trial let us know the date you commenced figuring the \$1,300.00?      A. Yes.

Q. Now, you said, I believe, didn't you, in response to a question on direct, that this figure was subject to modification?

A. What figure was that?

Q. The \$22,900.00.      A. I believe I did.

Q. And likewise, the figure for travel expenses and for moving?

A. That's right; in case there were debits or credits of which I was unaware, it might affect it.

Q. Now, Mr. Stephenson, you haven't actually performed any services for the company since some time in August, have you?      A. That's right.

Q. About August 22nd, or when?

A. I attended a stockholders' meeting that ran, it was either until the 18th or 19th of September.

(Testimony of A. W. Stephenson.)

Q. And you were informed, were you not, by the Chairman of the Board, that you were being paid your \$1,300.00 per month in any event up to and including October 15, 1951, weren't you?

A. There was a letter written on that date, but I don't believe I had it at the time of filing this complaint. [120]

Q. Yes. Now, you haven't attempted to obtain other employment since you left, or rather were released by Alaska Airlines, have you?

A. Not by direct contact, no.

Q. Well, what do you mean by direct contact, Mr. Stephenson?

A. By directly contacting employers in the industry.

Q. Yes. Well, now, I believe you testified it is practically too late in life to commence flying again, didn't you?

A. Commence flying for an airline, yes.

Q. And you would be more or less relegated to executive positions, wouldn't you, with airlines?

A. Yes.

Q. Didn't you testify that upon your return from the Army, Western Airlines offered you a choice of flying or executive positions?

A. Right.

Q. And you chose flying?           A. Right.

Q. And you had some 23 years of service with that company or allied companies absorbed by them, didn't you?    A. Right.

Q. Why didn't you, Mr. Stephenson, attempt to

(Testimony of A. W. Stephenson.)

obtain executive employment with Western Airlines after you were released by Alaska?

A. If counsel will be a little patient with me, I will tell you. [121] I had lost a son, a P-38 pilot, in the Pacific. I came back to work and I felt the only thing I could do and do satisfactorily was flying, for a short time at least.

Q. No, Mr. Stephenson, my question was why, after you left Alaska Airlines, you didn't attempt to obtain executive employment with Western or another airline.

A. Oh, I misunderstood your question.

Q. I'm sorry; is it clear now?

A. First, I am as yet unaware as to my status as an officer of Alaska Airlines. I have never been advised that I was no longer an officer of Alaska Airlines, and, naturally, to go into an executive position in another airline might result in a violation of the Civil Aeronautics Act.

Q. You were notified, weren't you, that your services were terminated?

A. I was never notified that I was not an officer of the company.

Q. Now, in figuring the \$22,900.00 as damages under this alleged contract, Mr. Stephenson, was it your intention to just remain idle for two years and collect \$1,300.00 a month from Alaska Airlines?

A. Certainly not; when I am paid what Alaska Airlines owes me I will go about my business.

Q. Then, \$22,900.00 is no representation whatsoever of your damages under the alleged contract

(Testimony of A. W. Stephenson.)

at all? A. Why is that? [122]

Q. Well, you don't intend to sit around two years.

A. I would be very fortunate to obtain any situation at a comparable salary, because usually in most normal airlines the executives are selected from junior executives; a man has a chance to work up through the airline.

Q. That didn't happen in your case with Alaska, did it? You came right from one airline to another?

A. I didn't ask Alaska for a position. [123]

\* \* \* \* \*

Q. Now, Mr. Stephenson, going back to your conversation with Mr. Marshall at the time you were employed; what did he tell you in connection with moving, or additional expenses, and your compensation or reimbursement?

A. He told me that I was to be paid the cost of whatever move I had to make from Los Angeles to either Anchorage or Seattle—that's in September we are talking about—and that I was to be paid expenses on the way from Anchorage.

Q. Is that all you were told on that occasion?

A. Right.

Q. Now, the next time, I believe you testified you had occasion to discuss moving expenses and additional expenses, was in January of 1951, isn't that what you said? A. Right.

Q. And will you state again what Mr. Marshall said in that respect on that date?

(Testimony of A. W. Stephenson.)

A. His statement was that it would be additional expenses for me and the company would pay it, but he didn't want me to make a permanent station out of Anchorage in the way of moving my home completely to Anchorage.

Q. Well, did you have any discussion as to what was meant by the term "additional expense?"

A. The problem was having my family with me. It had been three months that they had been in Los Angeles and I had been in Anchorage and Seattle, and I told Mr. Marshall that it was [135] time that something was done about that, and that if we could complete our planning as to where I was to live and what the permanent arrangement would be, I would bring them up. He asked me not to move any furniture, and bring my family to Anchorage, and stay here temporarily until we got a decision on the certificate and decided where the operation headquarters would be and the main office of the company

Q. Do you contend that Mr. Marshall, in that conversation, obligated himself to pay all those expenses you have listed in Exhibit 15, Mr. Stephenson?

A. I do, because I explained to him very carefully my situation. Mr. Marshall knew very well that it was very expensive to live in Anchorage, and the only method of getting to an economic means of living in Anchorage was to buy a home.

Q. But in that connection, Mr. Stephenson, isn't it true that all Mr. Marshall said was, "I know

(Testimony of A. W. Stephenson.)

it is going to be additional expense and we will take care of it?"

A. That is the substance of it.

Q. Do you think he meant that you should buy winter clothing in Seattle in anticipation of arriving in Anchorage in the winter, and the company would pay for it?

A. It certainly was additional expense to my family; they didn't need it in Redondo Beach.

Q. Of course you were making \$1,300.00 a month, weren't you?

A. And living in a hotel and restaurants all the time, too. [136]

Q. Well, now, you have submitted a voucher for \$46.35 called "Auto expense"; what is that for, Mr. Stephenson?

A. For the use of a car in Seattle while we explored the possibilities of the family staying there for a while.

Q. Didn't Mr. Marshall tell you to bring your family on to Anchorage?

A. He told me to bring my family where I could be with them, whether Anchorage or Seattle.

Q. How did he happen to say "I know it costs more money to live in Anchorage?"

A. Well, because it does.

Q. Well, then, did you have your choice of selecting either Seattle or Anchorage as a home?

A. I possibly could have had that as a place to keep my family.

(Testimony of A. W. Stephenson.)

Q. Then you rented a car, apparently—that is the car?

A. Yes, and incidentally in that respect, I used the car back and forth to Paine Field and the office during the day.

Q. Now, this item, Mr. Stephenson, of \$302.10 labelled “Hotel, meals and expenses Anchorage, January and February 1951”; the only support that you have for that, I believe, is that voucher for \$84.00 for—

A. No; there were some \$70.00 in cancelled checks—that includes the two next items, Mr. Nesbett; \$302.00 and \$371.00.

Q. I see; \$673.35.

A. There is some hotel bills— [137]

Q. And what supporting vouchers did you show, for example, in connection with meals and expenses in Anchorage?

A. Well, there's cancelled checks there for it.

Q. Mr. Stephenson, most of those checks, as a matter of fact, were written out either to you or written to Alaska Airlines and signed by you and taken in cash, weren't they?

A. Right.

Q. There is no way of knowing that those checks were used to cover additional expenses over and above the weekly living expenses?

A. The only thing I know is that I had no such expenses.

Q. But didn't you think Mr. Marshall would be interested in knowing generally if it cost you \$10.00 a day more than it did ordinarily—how you



(Testimony of A. W. Stephenson.)

arrived at the figure—some accounting to show how you arrived at the figure?

A. That's true, but I think the best support I can give it is the amount of money—incidentally, not all of the credit was claimed against the checks I wrote.

Q. I know; as I total it, the two items entitled, "Hotel, meals and expenses, Anchorage, January and February, 1951, \$302.10," and "Cost of moving preparations, Los Angeles to Anchorage, \$371.25," total \$673.35, and your checks covering that period covered \$700.00 and some odd dollars—

A. And there is also a hotel bill—

Q. And you took off part of that \$700.00 and arrived at this [138] total \$673 something; I was wondering what method you used—

A. There was also the hotel bill in addition to the checks.

Q. I know, but did you just look at the amount and figure two months—I'll knock \$100.00 and some odd dollars off and just charge Alaska \$673.35?

A. No; if you will notice the checks—I believe all of them were cashed here, or used here in Alaska, and had nothing to do with my travel or when I was away from here.

Court: The court will stand in recess for ten minutes.

Whereupon, the court recessed from 4:00 o'clock, p.m., until 4:10 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection the record will show

(Testimony of A. W. Stephenson.)

all members of the jury to be present. Counsel for defendant may proceed with examination of the witness.

Q. (By Mr. Nesbett): I have noticed in the accounts, yes—that none of those checks are marked for outside expenses accounts, but my point is, Mr. Stephenson, you had submitted vouchers, or did eventually submit vouchers in support of your expense reports; my question now is why you did not keep some record, even if nothing more than a pencil record to substantiate this \$673.35, other than just checks made out to Alaska Airlines and cashed by you.

A. Well, actually those amounts were not in great variance from what Mr. Marshall's proposal of \$300.00 a month for expenses [139] was anyway, that's why I didn't go into detail on the thing, and furthermore, a lot of this expenses was incurred by my wife when I would not be present—I would be out of town.

Q. Well, did you ask her to keep some record of some kind or other so you would know, or be able to prove to Mr. Marshall that those expenses were legitimately incurred?

A. It never occurred to me that the expense would need a great deal of additional justification.

Q. Well, for example, this item marked "Cost of moving preparations, Los Angeles to Anchorage, \$371.25," what expenses does that cover?

A. There's a couple of checks in there for boarding for the dog; there's also an item of \$26.00 or

(Testimony of A. W. Stephenson.)

\$27.00 for transportation from Los Angeles to Seattle—we didn't bring the dog with us at the time—and items of—as I say, those checks and the two hotel bills are in support of both of those items, not the one.

Q. Now, the next item is entitled "Excess costs in Anchorage to October 15, 1951, \$2,165.25"; now, does that cover your rental here, Mr. Stephenson?

A. Right.

Q. Rental and what else?

A. And the cost of the caretaker for the house in Los Angeles.

Q. What was your rental here?

A. \$250.00 a month. [140]

Q. And I will ask you whether or not that was rental, Mr. Stephenson, or payments on the principal of a mortgage?

A. Unless I make additional payments and go through with the purchase contract, the contract provides that it would apply only as rental.

Q. It is an ordinary contract where you buy a home, isn't it?

A. Not; it isn't ordinary in that respect.

Q. It is called a real estate contract, isn't it?

A. I don't know whether it is the standard form; I don't think it is, because of that clause in it. Because the way it was completed, or what it required for completion, it leaves something to be done yet before it becomes a purchase contract.

Q. But it is a fact that if you sold the home for at least as much as your purchase price, you

(Testimony of A. W. Stephenson.)

would get all that rental back, wouldn't you?

A. If I was fortunate enough to do a thing like that.

Q. You are no different from anyone else residing in Anchorage trying to buy a home?

A. Yes.

Q. Why is that?

A. Because I have to pay \$250.00 a month on it.

Q. I was curious to know how you got your dog up here; there is no item for it?

A. It was flown on United on their special arrangement from Los Angeles to Seattle and then came up on one of our MATS [141] trips.

Q. It came up on one of your planes?

A. MATS trip, yes.

Court: What is a MATS trip?

Mr. Stephenson: Military air.

Q. On an Alaska airplane that was flying for the Government at that time, is that correct?

A. That's right: it could have been a C-46, but as I remember it was a MATS C-54.

Q. Mr. Stephenson, I would like to ask you why you didn't rent or lease this home in Los Angeles when you decided to come to Seattle or Anchorage?

A. Because I didn't know when I might want it back, or whether I might want to sell it. If you had a lease you couldn't sell, and if you leased or sold you had no home to go to.

Q. At that time, from your testimony, you felt

(Testimony of A. W. Stephenson.)

that you were pretty well fixed with Alaska Airlines for a couple of years, didn't you?

A. That's right, and I felt that the minute I knew where I could purchase a home, that I would dispose of that home and consummate a purchase—complete it.

Q. What I mean is you, apparently, from your testimony, thought that you were going to be either in Anchorage or Seattle for quite some time; you certainly didn't think Alaska Airlines would be based in Los Angeles, did you? [142]

A. No, but I certainly didn't want to relinquish a good VA loan on a home and leave my family without some permanent home of some kind.

Q. Well, now, as a matter of fact, Mr. Stephenson, didn't you refrain from selling that home because you didn't know what your future was with Alaska Airlines, or you didn't know whether you were going to have a contract or not?

A. I did not.

Q. Well, if you knew you weren't going to be based in Los Angeles, why couldn't you have sold that home?

A. Because I didn't know where to buy another.

Q. But you knew you were going to be buying or renting somewhere other than Los Angeles, didn't you?      A. Yes.

Q. Then, I would like to ask you again why you didn't sell the home in Los Angeles and put the money in the bank and when you purchased prop-

(Testimony of A. W. Stephenson.)

erty—or when you knew where you were going to be, buy another home?

A. Because until I had definite assurance where I could buy and replace that home, I couldn't see my way quite clear to relinquish a home like that that only cost me \$69.00 a month to pay off.

Q. Or, can I say, until you learned what your future with Alaska Airlines was going to be?

A. No; until I learned where I might be stationed—where I might [143] replace it.

Q. Well, Mr. Stephenson, when did you first inform Mr. Marshall, or any officer of the company of the amount of these moving expenses and additional expenses?

A. I informed Mr. McMahan and Mr. Fink on September 19th.

Q. Of 1951?           A. Right.

Q. That is the date you submitted all these expense reports, isn't it?           A. Right.

Q. And with the vouchers attached?

A. Right.

Q. Did you give them any memorandum of the amount that those expenses represented at that time?

A. Yes; Mr. McMahan took it in his own handwriting. I only had a handwritten summary of it at that time.

Q. Wasn't it agreed on September 19th that Alaska Airlines would give you what is now Exhibit 6 and you would give them your expense reports on that date?

(Testimony of A. W. Stephenson.)

A. Travel expense reports, yes.

Q. Why didn't you on that date also give them something to inform them in some detail of the amount that your moving and additional expenses had risen to?

A. I assumed that Mr. Fink and Mr. McMahon were representing the company when they come in and gave me the company statements [144] and gave me a receipt for my vouchers, and because of the situation with Alaska Airlines, I didn't know what the total of those—or what the final cost would be to me.

Q. But, Mr. Stephenson, I will ask you again, what sum did you say that these expenses amounted to at that time?      A. \$3124.48.

Q. Couldn't you have given them something to substantiate that \$3124.00 at that time when you exchanged reports?

A. I told them I had the support for it—there it was—and whenever the company was ready to settle with me on the matter, why, I would give them in turn the vouchers and the statement.

Q. But you gave up the other vouchers without holding them out.

A. I got a receipt for them.

Q. Couldn't you have gotten a receipt for these other—additional—moving and so forth?

A. No, because the final cost to me had not been determined at that time. I didn't know what the final figure would be.

Q. You mean you didn't know what it was

(Testimony of A. W. Stephenson.)

going to cost you to get back to Seattle—Los Angeles—from Anchorage, and all that?

A. And I didn't know what the status was with Alaska Airlines.

Q. Well, then, was your thought—and you say you offered to submit these vouchers in support of these additional expenses whenever you got together and had an accounting?

A. Yes; I said when I surrendered those vouchers there would have to be an accounting and acceptance and final agreement [145] on the figure.

Q. That was on September 19?           A. Right.

Q. Did you ask for an additional meeting to get together on these additional expenses and moving?

A. I indicated that I was ready to discuss it.

Q. As a matter of fact, six days later you sued the company, didn't you?

A. Six or seven days later, yes.

Q. Mr. Stephenson, I will show you this paper and ask you if you can identify it?           A. Yes.

Q. What is it?

A. It is a notice of relief from duty as General Manager.

Q. What is the date on it, sir?

A. September 13th.

Q. And the signature?

A. There is no signature on it.

Q. The typed signature.

A. Raymond W. Marshall.

Q. Addressed to you. You received the original



(Testimony of A. W. Stephenson.)

of it, didn't you?           A. Yes; on the 15th.

Mr. Nesbett: Your Honor, I would like to introduce this in evidence. [146]

Court: The 15th of what month, sir?

Mr. Stephenson: September.

Mr. Hughes: No objection.

Court: Without objection it may be admitted and marked Defendant's Exhibit B and may be read to the jury. What is the date of it?

Clerk: Letter dated September 13, 1951. [147]

\* \* \* \* \*

DEFENDANT'S EXHIBIT "B"

September 13, 1951.

Mr. A. W. Stephenson,  
Anchorage, Alaska.

Dear Mr. Stephenson:

I am prompted to confirm my verbal remarks to you on August 22, 1951, shortly after my arrival here to the effect that I was relieving you of all of your duties with the company effective that date.

In view of the circumstances you will no doubt want to tender your resignation as an officer of the Corporation. However, if you prefer I will ask our Board of Directors to omit your name when the officers for the present year are chosen.

Wishing you the best of luck, I am

Yours very truly,

RAYMOND W. MARSHALL,  
Chairman.

RWM K S

(Testimony of A. W. Stephenson.)

Court: That is all, Mr. Stephenson; you may step down. Another witness may be called on behalf of plaintiff.

Mr. Hughes: Plaintiff rests, Your Honor.

Court: By the way—just a moment; do any of the jurors wish to interrogate this witness? Jurors have a right to inquire about anything on which they want information.

Mrs. Laughlin: I think it was on April 16th or thereabouts, when Mr. Marshall and you were discussing this contract, and your time was expired with Western Airlines?

Mr. Stephenson: That was one of the times, yes.

Mrs. Laughlin: Did he try to persuade you to stay there that time?

Mr. Stephenson: Yes.

Mrs. Laughlin: He tried to persuade you to stay with his company without the contract?

Mr. Stephenson: Yes.

Mr. Hughes: I didn't understand the date that you asked, Mrs. Laughlin.

Mrs. Laughlin: It was around the time his time expired with Western Airlines.

Mr. Hughes: Did you fix it in your question?

Mrs. Laughlin: I think it was in April, wasn't it?

Mr. Stephenson: My time expired with Western on the 17th of March.

Mrs. Laughlin: And you had a conference with Mr. Marshall [203] about that time?

(Testimony of A. W. Stephenson.)

Mr. Stephenson: That's right.

Mrs. Laughlin: You told him you had to either go to Anchorage or Western Airlines?

Mr. Stephenson: That's right.

Mrs. Laughlin: And he didn't want to give you a contract but he tried to persuade you to stay with them anyway?

Mr. Stephenson: That's right.

Court: That is all, Mr. Stephenson. Did counsel say that the plaintiff rests?

Mr. Hughes: The plaintiff rests, Your Honor.

Court: Very well. [204]

\* \* \* \* \*

Whereupon,

R. W. MARSHALL

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Nesbett): Is your name R. W. Marshall?      A. R. W. Marshall.

Q. Can you hear me all right, Mr. Marshall?

A. Perfectly; thank you very much.

Q. And you are Chairman of the Board of Directors of Alaska Airlines, are you not?

A. I am.

Q. And were you in that official position in September of 1950?

A. Yes; I had the position at that time.

Q. I will ask you whether or not you had occa-

(Testimony of R. W. Marshall.)

sion to discuss employment with Mr. A. W. Stephenson in the month of September, 1950?

A. Yes, I did.

Q. Did you enter into any employment agreement with Mr. Stephenson then? [316]

A. No, I did not.

Q. Well, did you employ him?

A. I did.

Q. What were the terms of the employment?

A. Replacement. Col. Bierds, our Vice President in Charge of Operations here in Anchorage was sick in the hospital and had been for some time, and we needed someone to look after his duties.

Q. What were the terms of the employment—how much was he to receive?

A. He was to receive \$1,000.00 per month plus \$300.00 per month for living expenses while he was in Anchorage before he moved, or, rather brought, his family to Anchorage.

Q. And was there any definite period of time agreed upon in this employment agreement?

A. No, there was not.

Q. Now, when did you again have occasion to discuss employment with Mr. Stephenson—the terms of employment?

A. Mr. Stephenson came to New York in January—January, 1951.

Q. Did you discuss employment terms, or contracts, with him on that occasion?

A. Yes; I think that was the object of the trip.

(Testimony of R. W. Marshall.)

He said that he was concerned about his leave of absence and was anxious to know what my views were because Col. Bierds meanwhile had come out of the hospital and was again ready for duty, and [317] actually performing certain duties.

Q. Did Mr. Stephenson ask you for an employment contract on that occasion?

A. I don't think he did in January.

Q. When did you next have occasion to discuss that matter with Mr. Stephenson?

A. In March.

Q. Of 1951?           A. Yes; that's right.

Q. I will ask you whether or not Mr. Stephenson in that month asked you for an employment contract?

A. Yes, he did, very definitely; he said that his six months leave of absence was about to expire and he would like to continue with Alaska Airlines.

Q. Did you give Mr. Stephenson, or promise to give him, then, an employment contract for a definite salary for a definite period of time?

A. No, I did not.

Q. What did you tell him in that connection, if anything?

A. I told Mr. Stephenson that now that Col. Bierds was back we didn't have any reason for paying two salaries for the same work; that we were planning, or hoping, to get a certificate to the States and if and when that certificate were granted, I would be glad to talk with Mr. Stephenson about it and see what arrangement we might

(Testimony of R. W. Marshall.)

make if he wanted to continue with [318] the company.

Q. Did you on that occasion promise him a contract for at least two years for a minimum of \$1,300.00 a month?

A. No, I definitely did not. We discussed that matter at length—I thought I had a note of it here, but it was for several days. Mr. Stephenson said that he liked the company and wanted to continue with it; that he did not want to go back to his piloting work, but that he wanted a contract. We really went round and round for several days, and Mr. Stephenson was exceedingly disappointed—seemed to be, at least—when he left my office a day or two before his contract was to expire, or, rather, his leave of absence was to expire, and when he left my office at that time, I did not know on that night in March—I think it was about the 15th or 16th—I did not know whether Mr. Stephenson would continue with us or not.

Q. What did he say to you, if anything, when he left?

A. He said he would make up his mind, consider it very carefully, and make his own decision as to what he would do.

Q. Did you have occasion to discuss the matter of a contract of employment with Mr. Stephenson at a later date?           A. Yes.

Q. When was that, if you recall?

A. To my surprise Mr. Stephenson came back to the office in April, a couple of weeks later.

(Testimony of R. W. Marshall.)

Q. Did he at that time, or on that occasion, ask for a contract [319] of employment?

A. Oh, yes, indeed; Mr. Stephenson came on April 7th.

Q. Did he submit to you a form of proposed contract?      A. Yes, he did.

Q. And did you two have any discussions concerning a contract of employment?

A. Yes, we discussed it for several days, from April 7th to April 18th, or, rather, I say we discussed it between those dates—I saw Mr. Stephenson, oh, probably three or four times during that period.

Q. Was he in New York all the time, or do you know?

A. Yes; oh, yes, he was in New York; I believe that he arrived in New York on April 3rd, but he never telephoned to me, nor did I have any contact with him until April 7th.

Q. Do you recall when you last saw him on that visit?      A. I beg your pardon?

Q. Do you recall when you last saw him on that visit—the date?

A. Yes; that was on April 18th; he left the office and I imagine that he left town at the same time.

Q. Did you discuss his proposed contract on that last day?

A. Oh, yes, we discussed it each one of the days that I saw him.

Q. I will ask you whether or not the terms of

(Testimony of R. W. Marshall.)

this proposed contract he submitted in April were the same as those of the proposed contract he submitted to you in March?

A. I don't know that there was too much difference about the two; [320] I don't recall—we have them somewhere, I think.

Q. You can identify that, can't you—Plaintiff's Exhibit 1?

A. Yes; this, I am quite sure, was the contract memorandum that he handed to me on his visit in April; yes, it says April in this paper.

Q. What salary does he ask for in that proposed contract?

A. \$1,500.00 per month; \$18,000.00 per year.

Q. And did he leave that copy of the proposed contract with you when he left—not that copy, but a copy?

A. I have seen this before; oh, yes, he left—not this one—he left a copy of it and I think we still have it.

Q. Does he set out any proposed salary in that proposed contract in the event Alaska Airlines should get a certificate?

A. Yes, he does; \$23,000.00 per year in the event that the company were to get a certificate.

Court: Has Exhibit 1 been read, counsellor?

Mr. Hughes: I read it, according to my notes.

Court: You read this to the jury, did you not?

Mr. Hughes: Yes, Your Honor.

Q. Well, then, what, if anything, did you tell



(Testimony of R. W. Marshall.)

him on the last day you saw him in April in connection with his proposed contract?

A. Oh, I told Mr. Stephenson about the same thing on both of his trips, in March and April. Mr. Stephenson was exceedingly anxious to get a contract, and I told him that I was sorry [321] that we couldn't consistently promise him a contract for the reason that he at that time was duplicating the efforts of Col. Bierds who had returned to the company, and that we did not know what certificate we might get or whether we would get a certificate at all, and naturally I couldn't make any promise to him because if we got no certificate, I did not know where he might be justified in a position with us.

Q. Mr. Marshall, in drawing up the expense account statements between Alaska Airlines and Mr. Stephenson, I notice he has been credited with \$1,300.00 every month instead of \$1,000.00 plus \$300.00 to cover expenses; can you reconcile that with your statement?

A. Yes; I heard about that for the first time in the Spring or Summer of 1951.

Q. Heard about what?

A. That he was getting a straight salary of \$1,300.00 per month instead of \$1,000.00 per month and \$300.00 additional allowance for living in Anchorage.

Q. Did you do anything about it when you learned that?

A. Yes, I did; I asked our Mr. Jacobson about

(Testimony of R. W. Marshall.)

it—I think I first asked Mr. Baruth and found out who might have been responsible for it, and he said he thought Mr. Jacobson in charge of our Payroll Department had done it, and I talked to Mr. Jacobson and he said yes, that Mr.—

Q. You can't tell what Mr. Jacobson told you, but in any event [322] you have allowed him \$1,300.00 per month for every month he was with the company up until October 15th, haven't you?

A. Yes; I haven't criticized that item; I have told Mr. Baruth to allow it.

Q. How much was Col. Bierds getting, whom Mr. Stephenson replaced?

A. Col. Bierds' salary is \$10,000.00 a year—I think Mr. Baruth—

Q. Is it any greater than \$10,000.00?

A. Oh, I don't think so; I am quite positive that it is not.

Q. Now, did you have occasion to examine an expense report of Mr. Stephenson's which contained a voucher for a dinner at LaBrie's? A. Yes.

Q. Do you recall the amount of that expense report, with respect to LaBrie's?

A. Well, I recall the LaBrie's item; that was \$200.00.

Q. And you had that voucher yourself for investigation, didn't you—or the report?

A. Yes; I held that for some months.

Q. Did you investigate the authority for the expenditure? A. Yes, I did.

(Testimony of R. W. Marshall.)

Q. What did you learn as a result of your investigation?

A. Well, I learned, rather, I found no record, by making suitable inquiries from LaBrie's restaurant, of Mr. Stephenson having paid the \$200.00.

Q. Mr. Marshall, at the time you employed Mr. Stephenson in [323] September of 1950, did you on that occasion, at that time, promise to pay his moving expenses to Alaska?

A. No; he spoke to me about that, but I told him, explained to him, that we had a strike here one time because we had advanced the transportation for certain men coming from New York to Anchorage—that was during the war—and when the other men found it out there was a great deal of discussion about it, in fact, before we knew that there was such a difficulty in connection with it, we had a strike on our hands.

Q. Because the other employees wanted transportation, too, was that it?

A. Oh, no; we had paid, I think, \$150.00—advanced \$150.00 to some employees to come from New York on American Airlines, and some other employees heard about it and they said they had paid their own fares, and we should allow them something; we allowed \$100.00 apiece to some men, I think, coming from California.

Q. All right, now; what did you say to Mr. Stephenson in connection with paying his moving expenses to Alaska?

A. I said, "Steve, if you have any items that

(Testimony of R. W. Marshall.)

would harm you, you speak to me about them and we will see what we can do about it.”

Q. Well, did you agree—

A. Because we couldn't, as a matter of policy, allow moving expenses as such, because if we did, it was against the company [324] policy, and if we did it for Mr. Stephenson, we would have to do it for others.

Q. Did you agree to reimburse him for all additional expenses of the higher cost of living in Anchorage, or Alaska?      A. No, I didn't.

Q. Did you agree to reimburse him for the higher cost of living that he would encounter when he moved to Alaska, or came here?

A. No; I agreed to allow him \$300.00 per month until he brought his family to Anchorage; that was the understanding.

Q. Was there any agreement that you would pay his rental payments on a home he might purchase?

A. No; there was no mention of that, as a matter of fact.

Mr. Nesbett: That's all, Your Honor.

Court: Counsel for plaintiff may examine.

#### Cross Examination

Q. (By Mr. Hughes): Mr. Marshall, can you hear me?

A. Perfectly, thank you; you speak very well.

Q. Thank you, sir. Now, Mr. Marshall, when you and Mr. Stephenson had your conversation back in New York and he spoke about expenses

(Testimony of R. W. Marshall.)

and you said "If you have any item that harms you, speak to me about it," did you write him out a check for \$1,500.00?

A. I don't think I did at that time; I don't recall.

Q. Could you have and not remember it?

A. Yes; you can do lots of things and not remember them, but when [325] you ask we whether I gave him a check at that time for \$1,500.00 I say to you that I would question it until I had checked more carefully.

Q. You just don't remember, then?

A. I don't remember sufficiently to testify as a matter of fact.

Q. Well, you would like to refer to the records, wouldn't you?

A. I would much prefer to do so.

Q. That's what I thought. Well, if the records disclose that, you wouldn't deny writing out a check for \$1,500.00 to Mr. Stephenson for moving expenses, would you?

A. I would; because I never gave Mr. Stephenson \$1,500.00 for moving expenses.

Q. Well, now you remember, is that right, that you didn't?

A. My answer speaks for itself, sir.

Q. Well, all right, what did you mean, Mr. Marshall, when you said, "If you have any items that harm you"—what was that?

A. I mean by that that we play fair with our employees and everybody else, and if Mr. Stephen-

(Testimony of R. W. Marshall.)

son, or any other employee, got into difficulty and had items that were harmful to them, all they need do is to come to our company and we help them as we assist many of them.

Q. Is that just a general statement of policy?

A. That is a policy, that we help employees, yes; a very definite policy.

Q. Well, then, you would help Mr. Stephenson the same as you help [326] the rest of your employees, is that right?

A. We certainly would.

Q. Now, did Mr. Stephenson say anything to you, sir, about the additional costs of operating here in Anchorage and maintaining two homes?

A. Yes, he did.

Q. And your statement is that you didn't agree to assume any of those costs?

A. I haven't said that.

Q. Well, did you or didn't you agree to assume those costs?

A. I did not agree to assume any definite costs; I told Mr. Stephenson that we would allow him \$300.00 additional per month during the time before he had his family in Anchorage, before he brought them to Anchorage, because he had told me that it would cost him more if he had a home in California, and if he came up here it would be an additional expense to him.

Q. Did you likewise tell Mr. Stephenson not to sell his home in California until you had determined where he was going to be situated?

(Testimony of R. W. Marshall.)

A. I wouldn't tell Mr. Stephenson or any other employee what to do about a home that they might have, and I did not make such a statement to Mr. Stephenson, no.

Q. I see. Now, you stated, Mr. Marshall, that Mr. Stephenson saw you in March of 1951, is that correct? [327]

A. That is correct.

Q. Now, he lingered around there several days, isn't that your statement?

A. I believe that is correct, yes.

Q. Now, just how many days is several days, Mr. Marshall, do you know?

A. He arrived on March 12th, according to my records, and perhaps left on March 14th, because I was in Washington on March 15th and I have no record of his calling upon me after that time until April.

Q. Well, then, is it your statement, sir, that you talked to him between the 12th and the 14th of March of 1951?

A. Yes; I talked with him all three days probably.

Q. Well, now, did Mr. Stephenson advise you that he had to have a decision from you one way or the other?

A. He told me he would like to have a decision because of his expiring leave from Western Airlines.

Q. Did he explain to you what that meant to him?

A. He did; he told me—what Mr. Stephenson

(Testimony of R. W. Marshall.)

actually told me was that his salary with Western Airlines was \$1,700.00 a month and I said to him, "Steve, why do you take a position with our company at less than \$1,700.00 per month when you can get \$1,700.00 per month from Western?"

Q. Now, Mr. Marshall, did he in fact tell you that is what his salary was when he quit? [328]

A. Exactly; he told me \$1,700.00 per month was the salary he was receiving from Western; he told me that on more than one occasion.

Q. You are positive he didn't state it is possible for him to earn \$1,700.00?

A. I don't think I mistook it.

Q. You have some trouble hearing?

A. He made that statement to me on several occasions and I am quite sure he made it to me on the initial trip he made to New York in September of 1950.

Q. Well, you have some trouble hearing, don't you, Mr. Marshall?

A. Yes, I do.

Q. Now, you stated that Mr. Stephenson was a replacement, I believe for a Col. Bierds, is that right?

A. That is correct.

Q. Is Mr. Bierds now managing the operation?

A. Mr. Bierds—no, he is in Everett in charge of a different department—costs of projections, and CAB matters, that he has looked after for several months.

Q. How long had Mr. Bierds been in charge of your operation as a General Manager?

A. He was Operations Manager here in Anchor-



(Testimony of R. W. Marshall.)

age from about the middle of 1947 to just a few months ago; probably December of 1951.

Q. Well, did he succeed Mr. Hoppin? [329]

A. No; he came here after Mr. Hoppin, and I don't recall at the moment whether there was someone in between in charge of operations here in Anchorage or not.

Q. Did I understand you to say that when Mr. Stephenson got back to New York in March of 1951, that you told him that he was really an extra man at that time, and that Mr. Bierds was now on his feet and that you really didn't need him?

A. I told him that in January, and I told him again in March, that as he well knew, Col. Bierds was on the job and functioning, and we had no need really, no need for two men for the same position, as our operations stood at that time, prior to the time that we received some certificate to the States.

Q. Well, then, he just more or less forced his services upon you, is that right?

A. I wouldn't say that that were so, because he came to us in September at the request of Mr. Adams, who was a counselor for the company at that time.

Q. What was the request of Mr. Adams?

A. I asked Mr. Adams who we might get to help us while Col. Bierds was in the hospital, and Mr. Adams proposed Mr. Stephenson and asked him to come to New York to interview me.

Q. Now, when you employed Mr. Stephenson

(Testimony of R. W. Marshall.)

first, did you inform him that he was a fill-in for that man that was in the hospital?

A. I most certainly did and he knew it himself before he came to [330] New York.

Q. That's what you told him—that he was a fill-in, and temporarily, until Mr. Bierds got out of the hospital, you had a job for him?

A. That is correct, sir; I told Mr. Stephenson very definitely that he was helping us out while Col. Bierds was sick in the hospital, and Mr. Stephenson at that time had no promise of what the arrangement might be made at some future date.

Court: We will stand in recess for ten minutes.

Whereupon, the court recessed from 4:01 o'clock, p.m., until 4:11 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection the record will show all members of the jury present. Counsel may proceed with examination of the witness.

Q. (By Mr. Hughes): Mr. Marshall, isn't it a fact that Mr. Bierds was never the General Manager of Alaska Airlines prior to the time that Mr. Stephenson was employed by you?

A. He never assumed the title as such, but he actually was the Manager of the company in Alaska.

Q. What was his title?

A. His title is Vice President.

Q. Now, as a matter of fact, Mr. Hudson was the General Manager, isn't that correct? [331]

A. That is not so.

(Testimony of R. W. Marshall.)

Q. Didn't he have that title?

A. I may say that no one ever had that title before Mr. Stephenson came. Mr. Stephenson said he would like to have that title and I told him there was no objection if he wanted to use it.

Q. Well, what title did you have for Mr. Hudson?

A. Mr. Hudson was Vice President, but he had charge of the maintenance and engineering of the company; he was based in Everett and rarely came to Alaska.

Q. Then, Mr. Stephenson was the first General Manager that you ever employed for Alaska Airlines?

A. He is the first man that ever assumed that title—I may say assumed that title as a Vice President. Mr. Wooten, who was President of the company, was actually a General Manager, although he never used that title.

Q. Well, now, Mr. Hudson departed from the company in December of 1950, isn't that correct?

A. I think it was about that time, yes.

Q. And Mr. Hudson departed after Mr. Bierds got out of the hospital, didn't he?

A. Oh, I don't recall; it was about the same time, I would say. I think Mr. Bierds came out of the hospital in December—the same month.

Q. Well, then, as a matter of fact, Mr. Hudson—

A. Although it might have been November—I

(Testimony of R. W. Marshall.)

am not sure—I am [332] speaking from recollection, purely.

Q. Mr. Hudson and Mr. Bierds had similar titles, then, is that right?

A. Yes; they were both Vice Presidents.

Q. I see. May I see Exhibit 5, Mr. Brunelle? I ask you, Mr. Marshall, to take a look at Exhibit No. 5; do you recognize that, sir?

A. I do; I wrote it—dictated it, and I signed it.

Q. Now, calling your attention to that, don't you recite in there that Mr. Stephenson is going to take charge as a General Manager of your operations?

A. It speaks for itself. "Mr. A. W. Stephenson has been chosen Vice President and General Manager of the Company as of today. He will make his headquarters in Anchorage and immediately take charge of the company's operations there."

Q. Well, now, then, when you say that Mr. Stephenson assumed that title, it was because you appointed him and you so stated in your communication, isn't that correct, sir?

A. Mr. Stephenson assumed the title because he specifically requested it. He told me that when he came up here he would like to be the General Manager, so I told him there was no objection to that. The company had never had a General Manager with that title before, although Col. Bierds actually was the General Manager of the company here for Alaska; he was the only Vice President,

(Testimony of R. W. Marshall.)

and he was based in Anchorage and looked [333] after all of the company's activities in the Territory.

Mr. Hughes: No further questions.

Court: Any redirect examination?

Mr. Nesbett: No redirect, Your Honor.

Court: Have the jurors any questions? That is all, Mr. Marshall; you may step down. Another witness may be called.

Mr. Nesbett: Call Mr. McMahan, Your Honor.

Whereupon,

GERALD J. McMAHON

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Nesbett): What is your full name, Mr. McMahan, please?

A. Gerald J. McMahan.

Q. And you are an attorney at law, are you not?

A. I am.

Q. And in your profession you have had occasion to represent Alaska Airlines in New York frequently, have you not?

A. My firm represents Alaska Airlines in New York.

Q. Do you know Mr. Stephenson, the plaintiff in this case?

A. I do.

Q. I will ask you whether or not you saw Mr. Stephenson in New York during the month of

(Testimony of Gerald J. McMahon.)

March, 1951?           A. I did.

Q. How many times do you recall that you saw him? [334]

A. Well, I saw him several times. It is my recollection that Mr. Stephenson was there for about a week, or approximately that period of time, and it just happens that the office of our firm is on the same floor of the building at 501 Fifth Avenue as is the New York Office of Alaska Airlines, so that we are right next to Alaska Airlines, and it is my recollection that Mr. Stephenson would, on occasion, come into our office—when he was in Alaska Airlines, would come next door to our office.

Q. Did you have occasion to discuss an employment contract with Mr. Stephenson in March of 1951?

A. Well, at that time, when Mr. Stephenson came to New York, I don't know how the question came up, whether I asked him or he volunteered it—in any event he told me he had come to New York in order to work out a contract with Mr. Marshall.

Q. Did you have occasion to attend any conference between Mr. Marshall and Mr. Stephenson?

A. No; it is my recollection that I did not attend any meetings between Mr. Marshall and Mr. Stephenson. I did talk with Mr. Stephenson, I believe, several times during that week in my office.

Q. Do you remember discussing the matter of a contract with him on the last day you saw him in March of 1951?

(Testimony of Gerald J. McMahon.)

A. I did talk to him casually, more or less, during the time he was there, and I told him that I would be happy—if he would [335] work out his business deal—after he got the details straightened out—I would be glad to help in the preparation of an agreement.

Q. That would have been your duty if any agreement had been reached, wouldn't it?

A. Yes; that would be a part of the services my firm was rendering to Alaska Airlines.

Q. On the last day that you saw him during the March visit, did Mr. Stephenson make any statement concerning his getting a contract?

A. I am not sure that it was the last day of his visit, but I do have a recollection that he told me that he was going back to the West Coast and that he had not been able to work out any arrangement with Mr. Marshall.

Q. Now, did you later have another occasion to discuss employment contracts with Mr. Stephenson?      A. Yes.

Q. When was that?

A. Well, it must have been a period of a week or two—I think approximately two weeks later. I think around the first week in April. I had not known up to that time that Mr. Stephenson was coming back to New York, he came into my office one afternoon and he brought with him—he had an agreement—a proposed contract—a formal agreement, in that it was a contract between Mr. Stephenson and Alaska Airlines, and I asked [336] him——

(Testimony of Gerald J. McMahon.)

Q. Is this Plaintiff's Exhibit 1 a copy of that proposed form of contract?

A. Yes, it is.

Q. And he asked you to look it over, did he?

A. Well, Mr. Stephenson came in with the paper and he said that Mr. Marshall had suggested that I look this over, and I said I would be glad to look it over and I asked him at that time who had prepared the document and he said he had had it prepared and he didn't volunteer who had worked it out for him but I could see from looking at it that it looked to me like a document which a lawyer had prepared, so I asked him that.

Q. Did you discuss the contract further with him?

A. Well, I said that I would look at it, but that as far as I was concerned, as I had told him originally—that before I could get into the picture, they had to make the business deal—that I couldn't help until the business arrangement had been arrived at.

Q. In other words, all you would be able to do would be to reduce it into a contract after they reached an agreement?

A. Yes; but I glanced at the agreement, and I do remember that I did point out this paragraph on the first page here which seemed to be—well, I told him as far as I was concerned, as a lawyer for the company, I would certainly under no circumstances recommend to the company that if a contract were to [337] be made, that the contract



(Testimony of Gerald J. McMahon.)

would set up a board of arbitration between an employee of the corporation and the corporation itself. I said as far as I was concerned it wasn't the position of outsiders to tell the management and the employee as to what agreement they should make.

Q. Do you recall the last time you saw him during that April visit?

A. Mr. Stephenson, by my recollection, was in New York upwards of more than a week—it must have been close to two weeks, at that time, and he came into my office back and forth; I saw him frequently; as a matter of fact, I would say there were days when I saw him almost every day, and the question of the contract came up, and I always told him that when he reached an understanding with Mr. Marshall I would be glad to help.

Q. Well, do you recall the last day that you saw him during the April visit?

A. Again, I am not sure that it was the last day he was there, but I do know that after he had been in New York a period of more than a week, he came in one afternoon——

Q. Pardon me; maybe I have confused you; do you recall the last day you saw him during his April visit?

A. I do remember the last day I saw him.

Q. Did he state to you on that date that he had a contract, or promise of a contract? [338]

A. Very definitely no; in fact, on that particular day, Mr. Stephenson seemed to me to be quite

(Testimony of Gerald J. McMahon.)

upset. He said that he had not been able to work out an arrangement with Mr. Marshall and Mr. Marshall did not want to commit himself until the certificate had been handed down, and that although they had discussed it, they had not been able to arrive at any agreement and in fact at that time I remember very definitely that I spoke with Mr. Stephenson and discussed the entire picture with him. I knew that he had been with another company and I knew from what he told me that he had had a leave of absence from that company, and I told him that in view of all the uncertainties of the situation that, speaking to him not as a lawyer for Alaska Airlines, but to be as helpful as I could, that if I were him, that I would consider very carefully what he should do—that if he had definite rights and a definite setup with the other company, that he should give very careful consideration to what he should do if he had not been able to reach an arrangement with Mr. Marshall.

Q. You now know that he is alleged to have lost his rights with Western on March 18th, don't you?

A. I know his rights expired as of March 18th; I know that now.

Q. Did you know it in April?

A. No, I didn't understand it at that time. I had not talked at any great length—I didn't know the exact arrangements he had; I knew he was on leave, but I didn't know the expiration of

(Testimony of Gerald J. McMahon.)

it, [339] in fact when I raised the suggestion, Mr. Stephenson didn't tell me that those rights had expired; he said in effect that he would think the matter over—he would give it some thought, and when he left I didn't know what decision he had made or when he made the decision.

Q. Now, Mr. McMahon, did you have occasion to come to Anchorage on or about—during the month of September of 1951?

A. Yes, I was in Anchorage during part of September of 1951.

Q. Did you have occasion to discuss expense accounts with Mr. Stephenson in Anchorage on or about September 19 of that year?

A. Well, I had, I think, a conversation with Mr. Stephenson on that date and maybe a few days before that. I tried to see if I couldn't help straighten out the situation which had developed.

Q. Did you have occasion to receive some expense reports from Mr. Stephenson on or about September 19?

A. Yes; I asked Mr. Stephenson if he would get all his receipts and his expense statements in, that I would try to sit down with him and see what we could work out, or what could be done with them, and I asked him to get the statement in.

Q. Did he bring them in on that date?

A. On September 19th I arranged a meeting with him and with Mr. Fink from the Accounting Office of Alaska Airlines, at the office of McCutcheon and Nesbett on 4th Avenue, and Mr. Stephenson

(Testimony of Gerald J. McMahon.)

came in and he brought with him a batch of expense [340] statements to which were attached some receipts and other supporting data.

Q. Did you give him a receipt for them?

A. Yes; at that time I had the secretary in the office of McCutcheon and Nesbett prepare a receipt which listed in detail all expense vouchers, expense statements, which Mr. Stephenson had delivered, and, as I recall, they covered the period from somewhere in February of 1951 up until the end of August or thereabouts, in 1951.

Q. Did you have occasion, then, to discuss vouchers in connection with moving and additional expenses with Mr. Stephenson?

A. I asked Mr. Stephenson whether the expense statement which he was submitting, and the supporting receipts, covered all the expenses which he claimed Alaska owed him; I told him that we couldn't—it was difficult for me or for the company to decide what the situation was unless we knew what he was claiming, and I asked him to get in everything he had, and I asked him if there was anything else he had not submitted.

Q. What did he say?

A. He said there were other items not included in the papers he handed me.

Q. Did he name those other items?

A. Moving expenses, as I recall.

Q. Was anything else said in relation to moving expense?

A. I asked him if he had with him the papers

(Testimony of Gerald J. McMahon.)

in support of the [341] expenses which he claimed for moving and he said, no, he didn't have them with him. I asked him to please get the statement on moving, or any receipts he might have to show he had spent money on moving, to get it in so that we could then at least have his complete account in front of us and he might know where he stood and we might know where the company stood.

Q. Did he at that time give you any figure as being his expense as of that date in connection with moving and other expenses?

A. I don't recall that he did.

Q. I will ask you whether or not he read to you, from a memorandum, or paper, a list of expenses that he had incurred in connection with moving and additional expenses on that date, that you copied down as he read to you?

A. I don't recall that, Mr. Nesbett, and if he had read from a statement or any paper, I would have asked him to let me have the paper to make a copy of it, because I wanted to get the complete story at that time. I do not remember Mr. Stephenson having anything in writing on the question of these moving expenses.

Q. Going back to New York, during the April visit, I will ask you whether or not you prepared any letter of contract, or contract in letter form that you took to Mr. Marshall's office with Mr. Stephenson?

A. No, I did not, Mr. Nesbett. As I explained

(Testimony of Gerald J. McMahon.)

it to Mr. Stephenson the instructions insofar as the preparation of the contract [342] were concerned would have to come to me from Mr. Marshall and when I was so requested and advised, I would prepare the document, and I never did receive those instructions.

Mr. Nesbett: That's all, Your Honor.

Court: Counsel for plaintiff may examine.

#### Cross Examination

Q. (By Mr. Hughes): Mr. McMahon, how long did you say Mr. Stephenson was back in New York in March of 1951?

A. He was—I can't recall; it is my impression he was there for a week or a little less than a week.

Q. Could it have been just a couple of days?

A. You mean two days? I would say no; it was my impression it was more than two days.

Q. Could it have been as little as three days?

A. It might have been three days, four days—it might have been five days.

Q. You don't know, in other words?

A. I am not certain as to the length of time Mr. Stephenson spent in New York in March.

Q. Now, in March of 1951, did you say that Mr. Stephenson talked to you considerably about his contract?

A. No; I would say that he did not talk to me considerably about the contract in March. In fact, it is my recollection that my discussions with Mr. Stephenson about the contract in March [343] were not in great detail; we didn't discuss it in any

(Testimony of Gerald J. McMahon.)

great detail, in fact I have a recollection of discussing some other matters with him in New York at that time.

Q. Did you do some other business with Mr. Stephenson at that time?

A. I do know at that time, since Mr. Stephenson was in New York, there was one other question which had come up about a contract which had been signed, which he and I spoke about.

Q. Do you recall what the contract was, or something to identify it?

A. Yes; I recall that Mr. Stephenson had entered into a contract with a chap by the name of, I think, Gren or Glenn Collins, and I had prepared a memorandum of some sort on the contract, and my recollection is that I had mailed a copy of the memo to Mr. Stephenson, and that Mr. Stephenson came in town, so since he was there we did talk about it.

Q. Well, then, your discussions with Mr. Stephenson in March were mainly concerned about other affairs, other than his contract with Alaska Airlines, is that right?

A. Well, actually, Mr. Hughes, I had no definite business with Mr. Stephenson in New York in March; he came in to see me.

Q. I see. Well, you don't know, then, what took place between Mr. Stephenson and Mr. Marshall in March of 1951?

A. Only so far as Mr. Stephenson told me as

(Testimony of Gerald J. McMahan.)

to what was going on, and what the results had been, and I may say also, as to what [344] Mr. Marshall told me as to what was going on.

Q. Now, then, in April, you said that you reviewed that Exhibit 1—the document that you have in your hand—you looked at it?

A. I looked at it, Mr. Hughes.

Q. I believe you also testified you did not prepare any memorandum yourself?

A. I did not, Mr. Hughes. To the best of my knowledge, I would say that I prepared nothing in writing at that time.

Q. And you stated, I believe, that that looked like it had been prepared by a lawyer, is that right?

A. It impressed me as being a document which had been prepared by a lawyer, Mr. Hughes.

Q. I will ask you if you think this one has been prepared by a lawyer?

A. It looks to me like a document which might have been prepared by a lawyer.

Q. Have you got any idea what lawyer—did you prepare it, sir?

A. Well, I will confess, Mr. Hughes, that I have no recollection now of having prepared anything in writing at any time during the period that Mr. Stephenson was in New York. Now, the other question, I think I may be able to answer it for you if I can find—the paper—East League Bond is the type of paper, or is it—no, this is Fidelity onion



(Testimony of Gerald J. McMahan.)

skin, and it is my recollection that in my office we use East League; now, I don't recall this document, Mr. Hughes. [345]

Q. Well, is it possible that you might have presented that to Mr. Stephenson and have since forgotten about it?

A. I don't want to say I am positive about it, because I'm not; I notice that it is dated April 17th. It is possible now, as I say, that I might have prepared that on April 17th, but I don't know where the paper could come from unless it's Mr. Marshall's paper.

Q. You cannot positively identify this document?

A. No.

Q. And you can't deny but what it might have come from your office?

A. Only in that it raises a serious question in my mind; the paper is not paper which we use.

Q. Is that the only thing that raises a question?

A. The other question is that I have no recollection of the terms as set forth in the proposed letter, Mr. Hughes.

Q. Well, the date April 17th is about the day that you last saw Mr. Stephenson, is that right—didn't you testify that way?

A. It is my recollection that Mr. Stephenson was last in New York, it must have been around the 15th or 17th—some time in that period—but I do know that it was just about that time that Mr. Stephenson left New York and came West.

(Testimony of Gerald J. McMahan.)

Q. As a matter of fact, Mr. McMahan, didn't you prepare a memorandum substantially as you see here, and neither Mr. Stephenson nor Mr. Marshall would sign it on the 17th day of April, 1951?

A. I have no recollection, Mr. Hughes, now, of preparing that document.

Q. Is the type similar to the type of the machines in your office?

A. If you'll let me look at it again—I didn't pay particular attention to the type—I would say it is similar; whether it is the same, I don't know. It seems to me the usual type of typewriter that might be used in any one of the law offices in the city.

Q. How long have you been employed by Alaska Airlines as counsel, Mr. McMahan?

A. Well, as I mentioned, it is not I; it is the firm that is employed. I would say from some time during the year 1947 up until this time; I don't remember the exact date.

Q. As a matter of fact, Mr. McMahan, in April of 1951, didn't you and Mr. Stephenson have a discussion in which you advised Mr. Stephenson that Mr. Marshall was allergic to contracts?

A. I have no recollection of that discussion, Mr. Hughes, and I don't believe that I would have made any statement of that sort.

Q. Well, you don't remember if you did make that statement?

A. Well, I would say that I did not make the statement. It is not the sort of a statement which

(Testimony of Gerald J. McMahan.)

I, an attorney for a corporation, would make to a man who is looking for a contract.

Q. Mr. McMahan, did you state that you got Exhibit 1, or a copy thereof, from Mr. Stephenson? [347]

A. Is that the document—the proposed contract?

Q. Yes.

A. Mr. Stephenson brought in a copy—a document of the type—either that or a copy of it; I would say it would be a copy of it.

Q. Did Mr. Marshall ever deliver a copy of that to you?

A. He did not. The only time I ever saw that document was when Mr. Stephenson brought it in to me.

Q. Do you know whether or not the files in your office contain a copy of that instrument?

A. They do; in fact, there is a copy of that document in my file.

Q. Where did you get that?

A. That is the one Mr. Stephenson gave to me.

Q. Oh, he gave you a copy?

A. Mr. Stephenson left a copy—brought a copy in to me on that date.

Q. But Mr. Marshall did not?

A. Mr. Marshall did not, in fact it was because Mr. Marshall did not that the problem was created.

Q. Well, now, Mr. McMahan, in September of 1951, I believe you stated that you, with Mr. Fink,

(Testimony of Gerald J. McMahon.)

had an accounting with Mr. Stephenson, is that correct?

A. I wouldn't call it an accounting. All that happened was that Mr. Stephenson brought in, after I had talked with him—in response to my request—brought in a batch, as I recall, a [348] rather thick batch, of expense statements covering a period of some six or seven months, and there could have been no time, and there was no time at that time to check them. I said, too, that they would have to go down to Everett to be checked, and that was one of the reasons I wanted him to get in all the other expense receipts which he claimed he had put out for moving; until they were in, there was no possibility of settling his account, or knowing what he claimed, until he gave them to us. He said he would get the other statement and the other receipts so that we could ship them down to Everett to be checked.

Q. As a matter of fact, Mr. McMahon, didn't Mr. Stephenson tell you that he would get the balance of it in as soon as he knew what his position with Alaska Airlines was, and when the moving was completed?

A. I would say definitely no, Mr. Hughes, because it is my strong recollection on that, that the only question that was had, and which he had not submitted any receipts—at least he said he had not submitted receipts on this moving question—he said he would get them together and have them in; he said he would get them in right away.

Q. That is your recollection?

(Testimony of Gerald J. McMahon.)

A. That is my recollection.

Q. Now, then, in regards to the items that he had on moving, isn't it a fact that he gave you a figure of what he had thus [349] far expended on moving and additional expenses, as he put it?

A. Mr. Hughes, I have no recollection now of Mr. Stephenson giving me any figures on the moving item. I do recall that it was an open item, and that he was going to submit the vouchers. Actually, I wasn't interested in what Mr. Stephenson told me as to what the figures were; I was trying to get receipts—documents which the Accounting Office could work on.

Q. If he did give you such a figure, you didn't transmit it, then?

A. I have no recollection of Mr. Stephenson giving me a figure, and I didn't transmit any oral figure. It was my recollection he was going to get together anything he had on moving expenses and submit them, and he was going to do it promptly.

Q. Now, I believe you testified that you prepared this list that bears the signature of Mr. Fink, that is an exhibit, is that right?

A. I am not sure that I prepared it. I am not sure whether Mr. Fink or I did it. I do have recollection of sitting down, or being in the room with the secretary, and having the expense voucher statement there, I think we just told the girl—turned them over to her and said to run off a statement so Mr. Stephenson would have a receipt for what he

(Testimony of Gerald J. McMahon.)

was turning in. I haven't seen the statement; I don't recall what's on it.

Q. It is Exhibit 10—that is the one—Exhibit No. 10. I will ask you to look at Exhibit 10, sir, and see if you recall whether you had it prepared or Mr. Fink had it prepared, if you know? [350]

A. I saw this and I saw it signed at that time by Mr. Fink and Mr. Stephenson, but I don't recall whether I prepared it or whether Mr. Fink prepared it.

Q. I see, and you definitely don't recall the document I showed you dated April 17?

A. No; I don't recall that, Mr. Hughes.

Court: I think we shall suspend now, unless counsel is particularly anxious to conclude with this witness this evening.

Mr. Hughes: We will bow to the wishes of the Court.

Court: Ladies and gentleman of the jury, the trial will be suspended until 10:00 tomorrow morning, and in the meantime you will remember the admonitions of the Court as to your duty. The court will stand adjourned until tomorrow morning at 10:00

(Whereupon, at 4:58 o'clock, p.m., on the 17th day of March, 1951, trial of the above-entitled cause was continued until the 18th day of March, 1951, at 10:00 o'clock, a.m.)

Be It Further Remembered, that at 10:00 o'clock, a.m., on the 18th day of March, 1951, the trial by jury of the above-entitled cause was resumed, the

members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding;

And Thereupon, the following proceedings were had:

Court: The witness, Mr. McMahon may take the stand; counsel for plaintiff may proceed with examination. [351]

Mr. Hughes: We have no further questions.

Court: Any redirect?

Mr. Nesbett: No questions, Your Honor.

Court: Has the jury any questions? That is all, Mr. McMahon, you may step down. Another witness may be called.

Mr. Nesbett: We have no further witnesses.

Court: The defendant rests. Is there any rebuttal testimony?

Mr. Hughes: I would like to recall Mr. Stephenson.

Court: Mr. Stephenson may resume the stand.

Whereupon

A. W. STEPHENSON

resumed the stand on his own behalf, and testified as follows:

Direct Examination

Q. (By Mr. Hughes): Mr. Stephenson, I would like to ask you if you recognize this document?

A. Yes, I do.

(Testimony of A. W. Stephenson.)

Q. When did you first see the document, sir?

A. On the 17th of April, 1951.

Q. And who gave that document to you?

A. Mr. McMahon.

Mr. Nesbett: May I ask the witness a question, Your Honor?

Court: Yes.

Mr. Nesbett: Were these ink marks put on here by you, Mr. Stephenson? [352]

Mr. Stephenson: They were, yes.

Mr. Nesbett: We have no objection to it being introduced in evidence.

Court: Without objection it may be admitted in evidence and marked Plaintiff's Exhibit 17, I believe.

### PLAINTIFF'S EXHIBIT No. 17

April 17, 1951

Mr. A. W. Stephenson

710 East 3rd Avenue, Anchorage, Alaska

Dear Mr. Stephenson:

In accordance with our understanding, I set forth below the basis upon which you are to serve on a full-time schedule as Vice President and General Manager of Alaska Airlines, Inc. in charge of operations, with your base at Anchorage, Alaska.

Your salary is to be at the rate of <sup>\$15,600</sup>~~\$15,000~~ annually, payable in equal monthly installments of \$1,300.00  
~~\$1,250.00~~. In the event that during the term of this



(Testimony of A. W. Stephenson.)

agreement Alaska Airlines is granted a Certificate of Public Convenience and Necessity to operate a scheduled service between Anchorage and Seattle, your salary is to be increased to the rate of \$18,000 annually, payable in equal monthly installments of \$1,500, effective upon the start of scheduled operations under said Certificate.

Since you are holding an elective office, this arrangement shall continue for so long as you shall continue to occupy the office of Vice President of Alaska Airlines. ~~In any event~~ it shall be terminable by either party upon thirty (30) days written notice to the other directed to the addresses indicated above.

Please indicate your acceptance by signing and returning the enclosed copy of this letter.

Very truly yours,

ALASKA AIRLINES, INC.

By .....

Accepted: April 17, 1951: A. W. Stephenson.

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Clerk: Yes, 17. It is a letter dated April 17th.

Q. You testified, Mr. Stephenson, that all of the ink marks, or ink writing, on here was your writing?

A. Yes; it's marks made with a ball point pen.

Mr. Hughes then read Plaintiff's Exhibit 17 to the jury.

Q. Now, Mr. Stephenson, if you will look at Exhibit 17—will you please state the circumstances

(Testimony of A. W. Stephenson.)

under which you received that exhibit?

A. Mr. McMahan handed this copy to me as we walked into the office of Mr. Marshall at 501 Fifth Avenue, New York, on the 17th day of April, 1951.

Q. Did Mr. Marshall, or any officer of Alaska Airlines, sign that letter, to your knowledge?

A. No.

Q. And did you sign that letter? A. No.

Q. And why did you not sign it?

A. Because it didn't contain the correct salary figures of the current salary, nor did it comply with the terms of the understanding that I had had that a written agreement should contain. [353]

Q. And when you say understanding, who did you have the understanding with, and when?

A. I had it with Mr. Marshall on previous occasions.

Q. Well, will you just recite briefly the occasions?

A. The week of the 15-16 of March.

Q. Then, neither party, so far as you know, signed that agreement? A. That's right.

Q. And certainly you did not?

A. That's right.

Q. On the reverse side of that Exhibit 17—is that your writing, sir? A. That's right.

Q. Well, it is to be disregarded, is that right?

A. That's right; it has no bearing on it.

Q. Now, on the occasion that Exhibit 17 was given to you, how long was Mr. McMahan in your presence? A. Just a few minutes.

(Testimony of A. W. Stephenson.)

Q. Did Mr. McMahon urge either you or Mr. Marshall to sign this letter?

A. No, I don't believe so.

Q. Well, do you recall what he said when he handed it to you?

A. He said "Well, this is what I brought in as my recommendation for an agreement."

Q. I will ask you, Mr. Stephenson, if on the 17th day of March of 1951, whether you would have remained with Alaska Airlines [354] if you didn't have an agreement for employment?

A. I certainly——

Mr. Nesbett: I object to that.

Court: The objection is sustained; it presupposes an agreement. No, the objection is overruled; he may testify; it doesn't affect the fact as to whether an agreement was or was not made.

A. I certainly would not.

Q. Mr. Stephenson, have you prepared a recapitulation of your expenses and salaries due from Alaska Airlines?      A. Yes, I have.

Q. I will ask you if you recognize that document?      A. Yes, I do.

Q. Did you prepare that instrument?

A. I prepared a pencil copy of it and had it typed.

Q. Now, with reference to that memorandum that you have before you, I ask you now whether or not the allegation contained in paragraph II of the second cause of action in your complaint, which concludes with the following language,

(Testimony of A. W. Stephenson.)

“Travel expenses February 11, 1951 to August 4, 1951”, I will ask you whether or not the figure of \$273.24 is correct?      A. No, it is not.

Q. What is the correct figure, Mr. Stephenson, if you know?      A. \$218.36.

Q. Now, in the same paragraph, where you say “Expenses for moving [355] and additional costs incurred at the request of the chairman of the board of directors of the defendant corporation, \$792.48”, I will ask you if that is correct?      A. No.

Q. Well, what is the correct figure, if you know?      A. \$179.31.

Q. And in the same paragraph, “Wages accrued and not paid to September 15, 1951, \$1,950.00”, I will ask you if that is correct?

A. No, that is not.

Q. Well, what is incorrect about that statement?

A. It should read “Wages accrued to October 15, 1951, \$2,695.20.”

Q. Then, the total amount should conform to the three items that you have just given us, is that not correct?      A. That is correct.

Q. And that figure, do you have that there?

A. I don't have it here, no.

Q. The total is \$3,092.87 instead of \$3,015.72, is that correct?      A. That is correct.

Q. Now, then, Mr. Stephenson, in your first cause of action, in the last paragraph, paragraph VII, in the middle of the page, you have alleged “that by reason of the defendant's failure to complete its contract of employment for the term and

(Testimony of A. W. Stephenson.)

period of not less than two years from March 15, 1951 to March 15, 1953, this plaintiff has been damaged in the amount of [356] \$22,900.00"; is that figure correct?

A. It is not correct when it is reconciled with the salary credits given me and computed on this paper.

Q. What figure, if you know, should go there?

A. \$22,100.00.

Q. Now, Mr. Stephenson, you have heard testimony, I believe, that you have received credits for wages for the period which you testified on your direct examination that you had not received; now, have you ever received any credit memorandum from Alaska Airlines crediting you with wages other than as shown in Exhibit 6, a copy of which—well, you can use Exhibit 6—other than as shown in this Exhibit 6 of the Plaintiff's?

A. No, I have not.

Q. In answering that question, did you take into consideration Exhibit No. 2, the tax form?

A. The tax form was not in the form of an accounting report to me; it was a statement of what the Alaska Airlines had reported to the Government that I had been paid, and the tax that had been deducted.

Q. Mr. Stephenson, I believe you heard the testimony of Mr. McMahan in regards to the delivery of vouchers on the 19th day of September, 1951; will you please state just what transpired between you and Mr. McMahan on that date in regards to the moving vouchers?

(Testimony of A. W. Stephenson.)

A. I read to him the items of expense that had been incurred up [357] to that date. He took those items in longhand, including the amount, and said that he would submit them with the other traveling expense accounts.

Q. Did you actually see him write those figures down?      A. I did.

Q. And where did this take place?

A. In Mr. McCutcheon's office.

Q. Who was there?

A. Mr. Fink was there a part of the time. Mr. Fink was preparing a list of vouchers for which they gave me a receipt at that time—travel expense vouchers.

Q. Do you know whether or not Alaska Airlines has an established policy on paying the moving expenses of employees?

A. Some of the policy of Alaska Airlines in paying expenses is contained in their employment agreement with their union representative of employees.

Q. Do you know what particular unions that embraces?

A. At this time I believe it includes all of the employees groups with which they have working agreements or contracts—the pilots, stewards, mechanics, and dispatchers.

Q. Did Mr. Marshall personally deliver to you voucher No. 1-514 shown on Exhibit 6 as \$1,500.00?

A. Yes; he gave me the check.

Q. And did Mr. Marshall sign that?

A. He did. [358]

(Testimony of A. W. Stephenson.)

Q. And was there any conversation at the time he delivered it to you?

A. The conversation was, "Do not make a permanent move to Alaska until we determine where you are going to live; don't move a lot of furniture and don't buy a home up there."

Q. Were any of the other checks listed in Exhibit 6 as moving, delivered personally from Mr. Marshall to you?

A. No; that's the only one.

Q. Did you write the rest of the checks yourself?

A. They were prepared by Mrs. Brislawn, the Assistant Treasurer, and signed by she and myself.

Mr. Hughes: No further questions.

Court: Counsel for defendant may examine.

#### Cross Examination

Q. (By Mr. Nesbett): Do you have that recap that you drew up, Mr. Stephenson?

A. Yes, I have.

Mr. Hughes: Your Honor—well, I have rested now—

Court: That's all right; go ahead.

Mr. Hughes: I did want to offer that recap in evidence and I neglected it—if I may do it now—

Mr. Nesbett: I was going to do that myself.

Court: It may be admitted in evidence to illustrate the testimony of the witness; I think it is not original evidence.

Mr. Hughes: No, it is not, Your Honor. [359]

Court: It may be marked Plaintiff's Exhibit

(Testimony of A. W. Stephenson.)

18. I suppose there is no point in reading it to the jury; it will be considered as read and counsel may refer to it at any time.

Mr. Nesbett: I will waive reading this.

Court: Very well; it may be considered as read.

Q. (By Mr. Nesbett): Mr. Stephenson, under the main heading Travelling Expense, I notice on the date, say, for example, of October 30—would it help you if you had this exhibit? A. Yes.

Q. You list \$100.00 as a debit, and \$287.26 as a credit, and then over in the right hand column, Balance due Stephenson, \$187.26; how did you arrive at those figures?

A. That was taken from the statement given to me on—that is our Exhibit 6.

Q. In other words, under Travelling Expense are all these items taken from Exhibit 6?

A. No; not all of them.

Q. Well, on those that were not taken from Exhibit 6, do you have any voucher, or anything that would support your accounting here?

A. That's right, I have.

Q. Is it in evidence? A. It is.

Q. Well, for example, where would a person look to find it on [360] those items that were not taken from Exhibit 6?

A. In your Exhibit A are exhibits of the cancelled checks and the vouchers submitted in the various exhibit numbers.

Q. This confuses me because it isn't hooked up in the way of anything in the way of vouchers or



(Testimony of A. W. Stephenson.)

reports or anything that would allow a person to analyze your claim.

A. All right; October 30 analysis is taken from Exhibit 6, Alaska Airlines' statement given to me on the 19th of September, 1951; the first entry is Voucher No. 10-325, Expense Advance, \$100.00; it is a debit. Voucher No. 10-469, Expense report, is a credit of \$287.26. That takes care of the month of October. November, Voucher 11-290, Expense Advance, \$200.00; Voucher No. 11-368, Expense, \$200.00; voucher 11-424, Expense report, credit of \$205.04.

Q. I see. Now, without going through all of it, can you say that you have separated Exhibit 6 into travelling expense and moving expense items?

A. And salary.

Q. And salary, yes. You have broken Exhibit 6 down into three separate headings here, is that it?

A. Exhibit 6, without additional credits that I was entitled to and for which I supplied vouchers.

Q. Well, how is the jury going to know where to look to try and reconcile your claim?

A. They are in the exhibits. For moving and additional expense, [361] there are vouchers for \$4,072.36.

Q. That is those cancelled checks that you turned in?

A. They are not all cancelled checks; there's some receipts and there's tickets and hotel bills, car rental, and many different—

Q. Did you allow yourself all the meals you

(Testimony of A. W. Stephenson.)

had turned in in this recap? A. That's right.

Q. And all the items in connection with additional expense shown in Exhibit 15, such as \$2,165.00 for rentals, and those items?

A. Right, all of them except with one exception, that was a \$47.00 item that was in error, and Exhibit 15 corrects for that item.

Q. You still maintain that you are entitled to \$22,100.00 as damages, Mr. Stephenson, is that correct? A. Right.

Q. Don't you think you would be able to get a job in the airline industry and mitigate those damages, assuming they are due you?

A. I don't know.

Q. Do you expect the jury to give you \$22,100.00 if they should find you had a contract? You are not just going to sit around and wait until the money is to be paid out, are you?

A. That states my situation as it is of this date.

Q. Did you testify in response to a question from Mr. Hughes, that you were requested to sign this letter that Mr. McMahan [362] is supposed to have seen in Mr. Marshall's office?

A. I don't believe I testified I was requested to sign it; he brought it in as his idea of a contract.

Q. Well, was anyone requested to sign it?

A. No.

Mr. Nesbett: No further questions.

Court: Any further direct examination?

Mr. Hughes: No further questions.

(Testimony of A. W. Stephenson.)

Mrs. Laughlin: I would like to ask Mr. Stephenson—you wanted a four year contract from Mr. Marshall, is that right?

Mr. Stephenson: That was my original request, yes.

Mrs. Laughlin: Whose idea was it about the two years?

Mr. Stephenson: It was his.

Mrs. Laughlin: He suggested that to you?

Mr. Stephenson: Yes.

Mrs. Laughlin: I am a bit confused, Your Honor. One of these witnesses is lying; is it up to the jury to determine which one is lying?

Court: Yes, indeed. Very few law suits occur without such supposition arising that somebody is not telling the truth; one of the things that we have juries and Courts for is to try to make the best estimate what the truth is. Sometimes witnesses wilfully testify falsely; sometimes they forget—don't see things the same way; I don't say that applies to this particular case, but in cases of automobile accidents, we know from experience [363] they may be seen by a dozen persons, and yet no two witnesses will report the same things, because they didn't see things the same—so that is one of the very serious duties of juries to try to determine what is true and what is not true.

Court: Are there any further questions? That is all, Mr. Stephenson.

Mr. Nesbett: Your Honor, in view of a question

(Testimony of A. W. Stephenson.)

Mrs. Laughlin has asked, may I ask Mr. Stephenson a few other questions?

Court: Yes.

Cross Examination—(Continued)

Q. (By Mr. Nesbett): Didn't you testify on the first day of this trial concerning that two year period—that you had asked for four years and Mr. Marshall thought that was too long a period?

A. That's right.

Q. And he suggested two years; is that your testimony now?      A. That's right.

Q. What did you do when he suggested two years?

A. I agreed that I wouldn't press for a four year contract; that two years might be all right; I might not want to stay in Alaska any longer than that.

Q. What did he say?

A. I don't remember that he made any answer to that.

Q. Well, then, he didn't agree to two years, did he?

A. Yes; he suggested that two years should be the term of the [364] contract.

Q. If any was ever made.

A. When the written contract was made, yes.

Q. Did he agree to give you a contract for two years?      A. Yes.

Q. What did he say when he made that agreement?

A. He said "I don't want to make a long term

(Testimony of A. W. Stephenson.)

contract of four years; I think that two years would be——

Q. Did you agree to two years?

A. Yes; I agreed that it would probably be all right, and that I wouldn't press the point, or wouldn't insist on making it four.

Q. Mr. Stephenson, I have a transcript of your testimony given before this Court and in front of this jury on March 12, 1952, prepared by Mary Kee-ney, the Court Reporter, and reading from page 3 of that transcript, the question was asked by Mr. Hughes, according to this transcript, "Well, did Mr. Marshall make any representations to you as to what the agreement was going to be?", on line 12, and the answer, "Well, my idea of it was that it should be for four years and he thought that would be a little too long, or too long, and that possibly two years would be agreeable, but that he didn't want to do that until the certificate was issued." Did you answer thusly?      A. That's right. [365]

Q. All right; the next question. "Well, did you agree on two years?"; answer, "Yes; it would have been satisfactory to me at that time to have done it that way." Question, "Well, did the two of you agree on a contract at that time, or a term?"; answer, "I conceded that point to him." Question, "Did you agree on wages?"; answer, "We agreed that the present wage would continue until the certificate was issued." Now, in your testimony, reading from the transcript at line 15 on page 4, Your Honor, answer, "My principal concern at that time, and I

(Testimony of A. W. Stephenson.)

expressed it to Mr. Marshall, was that I must be back in Los Angeles on the 18th or forfeit my rights with Western Airlines, and I remember once telling him that I better make up my mind—we better make up our minds—where I was going tomorrow; whether I was going to Anchorage or Los Angeles, and he again assured me—he said ‘Let’s go along and we’ll get a contract worked up when we get this certificate.’ We discussed many items, minor items of operation in Seattle and Anchorage, and intermittently interspersed our conversation with discussions about a long term agreement with me.” Does that answer sound familiar?           A. Yes.

Q. And where in any of these questions and answers did Mr. Marshall agree to give you a contract for two years?

A. I think the statements that I made there——

Q. You said two years would have been all right with you? [366]

A. That was his proposal as to the time.

Q. Is it your testimony that you two agreed at that time that you were to be employed for two years at \$1,300.00 per month?

A. That was the salary at that time and there was no particular argument about changing the salary until we got a certificate.

Q. Will you explain to the Court and the jury why two weeks later you are back there asking for a four year contract at \$18,000.00, and \$23,000.00 if you got a certificate?

A. Because Mr. McCutcheon and Governor Gru-

(Testimony of A. W. Stephenson.)

ening asked me to come back and Mr. McCutcheon prepared a contract and said, "This is what you should have."

Q. Then, you didn't have a contract at that time, did you?

A. Not a written contract, no.

Q. Mr. McCutcheon was sympathetic to your trying to get one, wasn't he?      A. Yes.

Q. But you didn't have one at that time, did you?

A. I had an agreement with him, orally, yes.

Q. Why did you try to welsh on your oral agreement?

A. I didn't try to. The change in salary was Mr. McCutcheon's recommendation of what I should get.

Q. But you had already agreed with Mr. Marshall, you said.      A. Yes, I had.

Q. Now you are back in two weeks trying to change the agreement?

A. I was back in two weeks trying to get the agreement reduced [367] to writing.

Q. Now, as a matter of fact, you had no contract, and Mr. McCutcheon tried to help you get one, didn't he?

A. I had no written contract.

Q. And he was sympathetic; and you left New York on April 17th without a contract, didn't you?

A. That's right.

Q. And no promise of a contract?

A. Yes; I had a promise of a contract.

Q. All right, then, how do you explain this Exhibit 17?

(Testimony of A. W. Stephenson.)

A. I explain that as an attempt by Mr. McMahon to write a contract which was not equitable in any manner, and not fair to me.

Q. But you had already made an agreement with Mr. Marshall, hadn't you?      A. Yes.

Q. Well, was it such a big job that Mr. Marshall couldn't have called Mr. McMahon in and said, "I agree to employ Mr. Stephenson for two years at \$1300.00 a month"?

A. What's that?

Q. Couldn't Mr. Marshall have called Mr. McMahon in, or couldn't the two of you have written that agreement, "I agree to employ you for two years at \$1300.00 per month"? It wouldn't have taken five minutes, would it?

A. \$1300.00 per month was not to be considered once we got a [368] certificate.

Q. I know, but you are standing now on what you claim to be a two year agreement at \$1300.00, aren't you?      A. That's right.

Q. Couldn't you, in five minutes, have reduced that to writing if Mr. Marshall had ever agreed upon it?

A. I did; in March I gave him the outline of the items that I wanted in the contract.

Q. That was a very simple little memorandum proposal by you, wasn't it?      A. That's right.

Q. And he didn't sign it, did he?

A. It was not prepared in the form of an agreement.

Q. Incidentally, that agreement called for four



(Testimony of A. W. Stephenson.)

years, didn't it—the proposed agreement?

A. Yes.

Q. Then you want the Court and jury to believe that Mr. Marshall promised you on March 17th or thereabouts, two years employment at \$1300.00 per month, and yet reconcile that with your action in trying to get four years at \$18,000.00 and \$23,000.00, less than two weeks later, don't you?

A. I want the jury to understand that on March 16th and 17th, that we were both in accord that the salary of \$1300.00 per month was agreeable at that time until we received a certificate and the operation became larger. [369]

Q. And you were to get no definite contract until it was determined if Alaska Airlines would ever get a certificate, were you?

A. I was to get a written contract and an increase in salary when we knew what the certificate gave us, or whether we got one or not.

Q. Then you were to get your two year agreement reduced to writing when Alaska got a certificate?

A. So far as salary is concerned, yes.

Q. All right, now; if that verbal, oral, agreement was made in March and you both agreed that you would not do anything about it until you got a certificate, you must ask the jury also to reconcile your action in going back two weeks later and asking not that you get two years and \$1300.00 in writing, but that Mr. Marshall now sign another contract for four years at an increased salary, with

(Testimony of A. W. Stephenson.)

another increase after you got the certificate.

A. That was Mr. McCutcheon's suggestion and recommendation because he felt, and Governor Gruening felt that the Civil Aeronautics Board should know what the management of Alaska Airlines was going to be in case they were given a certificate or convenience and necessity to operate to the United States.

Q. And Mr. McCutcheon tried to help you get a contract, an agreement, didn't he?

A. Yes, he did. [370]

Q. You knew and he knew that you had no agreement at that time, didn't you?      A. No.

Q. You rode down on the airplane with me when I was going to San Francisco, didn't you?

A. That's right.

Q. We discussed this matter, didn't we?

A. Yes.

Q. And I was in sympathy—I was hoping you would get a contract, too, wasn't I?

A. You were in hopes that the contract should be written up and completed.

Q. Now, Mr. Stephenson, is that your recollection?

A. That's exactly my recollection.

Q. Why did you go back in April, when you had agreed verbally that you would not do anything more until the certificate was granted? The certificate wasn't granted until late in May, was it?

A. I went back at Mr. McCutcheon's request and because I was concerned as he had expressed his

(Testimony of A. W. Stephenson.)

concern and Governor Gruening had expressed their concern that they would have to show the President that Alaska Airlines had an organization set up to operate an airline to the United States.

Q. Well, you had been running the show for ten months, hadn't you, at that time? [371]

A. About six months.

Q. Well, we had an organization; it was functioning all right, wasn't it?      A. Yes.

Q. But in spite of your oral promise, you would have the jury believe, to Mr. Marshall, and his to you, you go back in two weeks and ask for an entirely different setup?

A. There was not a great deal of difference; it was simply formalized and written out.

Q. Only twice as long; four years instead of two; at \$18,000.00 instead of \$1300.00, and \$23,000.00 instead of \$18,000 when you got the certificate; is that right?      A. Yes.

Q. Every term of this verbal agreement was changed in your proposed written agreement, wasn't it?      A. Not every term.

Q. You had four years instead of two, didn't you?

A. The original proposal in March was four.

Q. I am talking about this so called verbal agreement; you say that you agreed on two years and \$1300.00, which would be \$15,300.00 a year, wouldn't it—wait a minute—that's what it says in the transcript—

(Testimony of A. W. Stephenson.)

Court: He said \$15,300.00. The jury can figure it out.

Q. Anyway, Mr. Stephenson, you say that you and Mr. Marshall had agreed on two years at \$15,600.00? [372]

A. No; I said \$15,300.00.

Court: As a matter of figures it would be \$15,600.00. I figure it is just a lack of accuracy in mental arithmetic which afflicts me very frequently.

Q. To get back, then, the terms that you asked the jury to believe were agreed upon were that you were to get a two year contract at \$1300.00 a month, isn't that it—\$15,600.00?

A. Until the certificate was issued, and then the salary was to be changed.

Q. Then two or three weeks later you are back saying, "Here's a proposed written agreement for four years with a salary of \$18,000.00 a year, and \$23,000.00 a year if we get a certificate", aren't you?

A. I presented that contract, yes.

Q. Then, that is not at all consistent with your keeping your word in connection with this alleged oral agreement, is it?

A. That was Mr. McCutcheon's suggestion as to the way the contract should be written.

Q. That was because you had no agreement with Mr. Marshall and he thought you should have, wasn't it?      A. No.

Q. How do you explain it—did you tell Mr. McCutcheon, "Look, I've got a verbal agreement with Mr. Marshall; I can't go back on it"?

(Testimony of A. W. Stephenson.)

A. Mr. McCutcheon told me, "You should have a contract written." [373]

Q. That's because he knew you had no contract or promise of one, wasn't it?

A. I don't know what Mr. McCutcheon's reasons were for it.

Q. Well, you confided in us, and with him, didn't you? Did you tell him about this so-called oral agreement? A. Yes, I did.

Q. And in spite of this, did you go right on and try to bulldoze Mr. Marshall into another agreement?

A. I took the agreement that Mr. McCutcheon prepared and gave it to Mr. Marshall.

Q. And you stood on it, didn't you?

A. No; not necessarily.

Q. Well, you tried to get him to agree to it, didn't you? A. Yes.

Q. And he wouldn't agree to it, would he?

A. He didn't say he wouldn't; his only answer was, "We will turn this over to the attorneys for the legal angles of it and have them prepare a draft and check it and report to us."

Q. If we can believe this letter—I don't know—maybe it was prepared there in New York—the thing that comes out of it mainly is that it is terminable on 30 days written notice?

A. That's right.

Q. What happens to this thing—it's degenerated from 2 years to 4 years, \$18,000.00 instead of

(Testimony of A. W. Stephenson.)

\$1300.00 a month—then it's terminable on 30 days notice; did you get mad when you [374] saw that?

A. Yes.

Q. You left New York? A. Yes.

Q. And you thought it over? A. Yes.

Q. Then you decided to go back and catch Mr. Marshall on this so-called verbal agreement, is that it?

A. No; I came out and went back on duty negotiating labor contracts and so forth and things that were pressing.

Q. When they got the certificate in May, you didn't bring the matter up to Mr. Marshall, did you? A. No.

Q. And in asking for your damages you didn't commence your two year contract from the date of the granting of the certificate, did you?

A. No.

Q. In the transcript of your testimony on the date I mentioned previously, the reporter has the following on page 6, an answer, "That's right," and the question, "Well, now, do you recall Mr. Marshall's statements in regard to this instrument when you delivered it to him?", referring to this first proposed agreement. "His statement was that he didn't—that now wasn't the time to complete an agreement; we would still wait until we got the certificate and knew what we had, what [375] size the operation would be, where I might live. The thinking was that if we got a certificate to the States we could operate out of Seattle rather than

(Testimony of A. W. Stephenson.)

Anchorage." That sounds familiar, doesn't it?

A. Yes.

Q. That was your testimony, wasn't it?

A. I don't know which agreement it refers to.

Q. I am sure it refers to the first proposed agreement that you have a copy of. That's definite. And, again, on page 7, question, "Well, what did Mr. Marshall advise you to do, if anything?" (in connection with your conversation and contract); answer, "He advised me to go on back to Anchorage and when we get this certificate and get squared away, why, we will make a satisfactory agreement." That is your testimony, isn't it?

A. That's my testimony; and it pertained to wages particularly.

Mr. Nesbett: No further questions.

Court: We will take a recess for ten minutes.

Whereupon the court recessed from 11:03 o'clock, a.m., until 11:13 o'clock, a.m., at which time the following proceedings were had:

Court: Any further direct examination?

Mr. Hughes: We have no further questions.

Court: That is all, Mr. Stephenson; you may step down. Another witness may be called. [376]

Mr. Hughes: We have no further rebuttal.

Court: Any surrebuttal?

Mr. Nesbett: Your Honor, we have one witness; at this time I would like to serve defendant's additional request for instructions and pass a copy to Your Honor. Call Mr. Baruth.

Whereupon,

C. W. BARUTH

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

\* \* \* \* \* [204]

Direct Examination

Q. (By Mr. Nesbett): Mr. Baruth, do you recognize that document?      A. I do.

Q. What is it?

A. It is a summary statement of the account of A. W. Stephenson.

Q. Did you prepare it?      A. I did.

Q. When?      A. Last night.

Q. Did you receive any assistance?

A. I did.

Q. From whom?

A. Counsel for the defendant.

Q. Did counsel give you any instructions in preparing that statement?      A. He did.

Q. What were they? [377]

A. To prepare a statement as reflected on the books of the company down to the present balance, giving effect to allowances which counsel deemed advisable to make to the credit of Mr. Stephenson's account.

Q. In other words, you were instructed, were you not, to give Mr. Stephenson the benefit of any doubt in connection with any claimed expenditure and draw up a present theory of the case insofar as Alaska Airlines is concerned?      A. Yes, sir.



(Testimony of C. W. Baruth.)

Q. You did that, did you? A. Yes, sir.

Mr. Nesbett: Your Honor, I would like to offer that in evidence as being the last stand—

Court: Have you a copy for plaintiff's counsel?

Mr. Nesbett: Yes, I have, Your Honor, and one for you.

Court: I am wondering if we might not save time by suspending now until 1:30; would it be convenient for all the jurors to return at 1:30 instead of 2:00?

Mr. Nesbett: It would be all right with me; I think I could finish in ten minutes.

Court: This is quite an extensive statement; there is probably no new material in it.

Mr. Nesbett: It is very simple, Your Honor.

Court: It might not be simple to the other party. Is that agreeable with you? [378]

Mr. Hughes: That is is agreeable with me.

Mr. Nesbett: If counsel for plaintiff is ready to go ahead, we can go ahead now with this matter.

Court: Is there objection?

Mr. Hughes: I would like to study it, frankly, Your Honor; I don't know.

Court: Well, all right, then; you may step down, Mr. Baruth; come back at 1:30.

Mr. Hughes: Just a minute, Your Honor; perhaps no good purpose would be served, because this is just illustrative; let's proceed—we will go ahead with it.

Court: Without objection, then, the exhibit will

(Testimony of C. W. Baruth.)

be admitted in evidence for the purpose of illustrating the testimony of the witness.

Q. Mr. Baruth, to shorten things, this statement is a final analysis of the stand Alaska Airlines takes with respect to the account of Mr. Stephenson with the Alaska Airlines, is that correct?

A. Yes, sir.

Q. This document dated September 11th is nothing more than a restatement of Exhibit G, final balance shown in Exhibit G, isn't it?

A. I think you mean Exhibit 6.

Q. Exhibit 6, excuse me; isn't that a fact?

A. Yes, sir; we bring forward those totals. [379]

Q. Which would show a balance due Alaska Airlines of \$7,623.74? A. Yes, sir.

Q. That is prior to the time, Mr. Stephenson turned in all these expense reports?

A. That is correct.

Q. Now, on October 25 you have credited certain payroll checks to Mr. Stephenson, haven't you?

A. Yes, sir.

Q. In the total sum of \$1,932.60?

A. Yes, sir.

Q. And that carries his pay right up to October 15 of 1951, doesn't it? A. Yes, sir.

Q. Then, for net expense allowable, as shown on Exhibit E, which covers expense reports from February 11 through September 1, 1951, where did you get that total of \$2,766.81?

A. The total in the lower right hand corner of Exhibit E.

(Testimony of C. W. Baruth.)

Q. In other words, you have merely brought the total from Exhibit E forward into this statement?

A. Yes, sir.

Q. And Exhibit E showed the expenses that Alaska Airlines considered reimburseable to Mr. Stephenson after making certain disallowances, didn't it?

A. Yes, sir.

Q. So he is given credit, then, for \$1,932.60 payroll, and [380] \$2,766.81 for expenses?

A. Yes, sir.

Q. Or a total of \$7,150.88?

A. That is correct.

Q. Then, acting on our instructions last night, and working with some of us, you went on and took an item marked, March 17, Alaska Airlines passes credit to account of A. W. Stephenson for difference between Exhibit G and H, being charged back for meals—will you explain that?

A. Originally exhibit G showed a total of \$856.63 being charged back for meals, and later audit which resulted in Exhibit H showed that the total should have been only \$854.41.

Q. What have you done on this recap?

A. Passed additional credit to Mr. Stephenson's account of \$2.22, being the difference between Exhibit G and H.

Q. The next item is marked, March 17, Alaska Airlines, Inc. passes credit to account of A. W. Stephenson as follows: For moving expenses—and what have you done in that connection?

A. We made an allowance for 1½ fares from

(Testimony of C. W. Baruth.)

Los Angeles to Seattle, in the amount of \$98.00; 2½ fares from Seattle to Anchorage, \$211.40; hotel and meals while in Seattle, \$196.55; air fare for newspaper correspondent from Naknek to Anchorage, \$47.73; making a total credit passed to Mr. Stephenson's account in the amount of \$553.68.

Q. All right, now; you have another March 17th item, and, acting [381] under our instructions, what did you do in that connection?

A. We credited to Mr. Stephenson's account the items which were the 25% discount items on air fare; they covered the period March 11 to March 17 when Mr. Stephenson paid a \$5.00 charge——

Q. Don't list all the items, but all those air fares that he apparently bought himself and you deducted 25%, you gave that money back to him?

A. We returned 25% in each case, making a total of \$194.28.

Q. That was done on the theory that although it was not explained in any way, it might have been justified somehow or other if it had been explained?

A. Yes, sir.

Q. And you have drawn up your summary at the bottom, have you not? A. Yes, sir.

Q. Starting with your \$10,000.00, you have deducted all the credits given to Mr. Stephenson, have you not, \$7,901.06? A. Yes, sir.

Q. And come out with a total due from Mr. Stephenson to Alaska Airlines of \$2,174.15, is that correct? A. Yes, sir.

Mr. Nesbett: That's all.

(Testimony of C. W. Baruth.)

Court: Counsel for plaintiff may examine.

Mr. Hughes: What is the exhibit, counsel?

Mr. Nesbett: It should be Exhibit I.

Court: Exhibit I may be considered as read to the court. [382]

### Cross Examination

Q. (By Mr. Hughes): I call your attention, Mr. Baruth, to the summary credit, I believe it is, for the period of 8-24-51 to 8-31-51, in the amount of \$302.70, is that correct?

A. Returning to Exhibit 6, Mr. Hughes, being the statement of September 11, 1951, you will find at the bottom of the page, August 15, 1951, credit from payroll for check No. 3065, \$536.20; that was the period from August 1st to August 15th. Then, on August 23rd, there is a credit from payroll, check No. 3115, which is the period from August 16th to August 23rd.

Court: How much?

Mr. Baruth: \$256.49. Then, on Exhibit I, the summary, from August 24, 1951, until August 31, 1951, is \$302.70; so, in effect, Mr. Stephenson's account has received credit for his complete payroll from August 1st straight through to August 31st.

Q. Now, then, the item on Exhibit 6, \$256.49—

A. Plus the \$302.70 on Exhibit I.

Q. Yes; now, that equals the pay for what period?

(Testimony of C. W. Baruth.)

A. That equals pay for the period August 16th through August 31st.

Q. In other words, a total of \$559.19, is that correct?      A. That is correct.

Q. Well, how do you explain, Mr. Baruth, that other periods of pay covering a like period amount to \$543.30?

A. There was some cancellations in there for group insurance, [383] Mr. Hughes.

Q. That is not reflected here, then?

A. These are the net payroll amounts.

Q. Then, how did you happen to cancel them, Mr. Baruth?

A. It was cancelled from the private payroll account.

Q. Well, whose order was that?

A. We were notified on August 23rd, that Mr. Stephenson was relieved of all his duties, and the girl who handles the private payroll made a cut-off there; that's the reason for the August 23rd salary credit in the amount of \$256.49, being the period August 16th to the 23rd.

Q. Well, now, Mr. Baruth, the check that has been testified to in the amount of \$1,500.00 as moving expenses, as evidenced in Exhibit 6, under date of, well, voucher No. 1-514, March 30, 1951, in the amount of \$1,500.00, that is still being carried as a debit, isn't that correct?      A. Yes, sir.

Q. And the item of the \$700.00 check, voucher 12-524, that's still being carried as a debit, is that correct?

(Testimony of C. W. Baruth.)

A. Those debits are reflected in this net total, Mr. Hughes.

Q. Yes; they the still debits—there is no credit allowed for that? A. No.

Q. Is that check for \$1,500.00 in Exhibit A?

A. I don't know; Mr. Nesbett had it. [384]

Mr. Nesbett: I can answer that; it is not, Your Honor. It is here in court if you want to see it.

Mr. Hughes: Well, it wasn't made a part of Exhibit A?

Mr. Baruth: No, sir.

Mr. Hughes: No further questions.

Court: Any redirect?

Mr. Nesbett: No, Your Honor.

Court: Have the jurors any questions? That is all, Mr. Baruth. Is there any further surrebuttal?

Mr. Nesbett: No, Your Honor.

Court: This evidence now offered is scarcely surrebuttal, so if the plaintiff has anything to offer in explanation or contradiction of this last exhibit and the last testimony given, he may offer it. I suspect that all relevant testimony on the entire subject has already gone in.

Mr. Hughes: No, we have nothing further to offer.

Court: That concludes the trial of the case as to testimony. Counsel for plaintiff may proceed to argument.

Mr. Hughes: I would like to inquire of the Court whether or not the proposed instructions have been

handed up to the Court—that is, plaintiff's proposed——

Court: They came up this morning and I haven't read them all.

Mr. Hughes: I see.

Court: I think plaintiff's first instruction will be given in substance, with perhaps some additions. [385]

Mr. Nesbett: Your Honor, if Mr. Hughes wants some time before he commences his opening argument, it will be all right with me to adjourn until 1:30.

Court: Is that agreeable?

Mr. Hughes: I don't want to inconvenience the jury or the Court, but if that is agreeable, I would just as soon make a complete argument at one time. It is going to be interrupted by the noon hour.

Court: You prefer not to be interrupted by the noon recess?

Mr. Hughes: I would prefer not to.

Court: All right; if it is agreeable to the jury, we will go forward at 1:40.

Mr. Nesbett: Your Honor, at this time we would like leave to amend our pleadings to the extent of inserting two affirmative defenses that appear to be appropos in view of the evidence that has been produced here during the trial.

Court: These affirmative defenses are offered to conform with the proof, is that right?

Mr. Nesbett: Yes, Your Honor.

Court: Is there objection?



Mr. Hughes: Well, I would object to the interposing of the affirmative defenses at this time, in that they don't come timely. I will admit that the defense can take advantage of their proof, but I would object on the ground that affirmative defenses at the present time are not timely and we were not advised that they [386] were to rely upon them during the course of the trial and, accordingly, their case is not jeopardized by the lack of such affirmative defenses—

Court: They will be considered denied by the plaintiff even if the order is that the defendant may submit these affirmative defenses; they are considered denied by the plaintiff and the jury will be so instructed. I don't know whether affirmative defenses are necessary to raise the points.

Mr. Nesbett: That was our thought, Your Honor.

Court: If the defendant desires, the complaint may be considered amended to include the affirmative defenses and the affirmative defenses must be considered by the jury and the Court as being denied by the plaintiff. Under our present procedure, affirmative defenses, when stated in an answer, are considered denied under the rules, and no reply thereto is necessary, or in fact, admissible. Order may be made to permit the defendant to amend to include affirmative defenses. I shall have to have a copy of it to take care of the affirmative defenses in the instructions. Incidentally, the instructions heretofore written will necessarily, in view of the testimony received this morning, require extensive revision, and I do not know how

soon the typing can be done. Is this to be filed, or is it to be put in some further form, Mr. Nesbett?

Mr. Nesbett: I thought it could be put right in the pleadings.

Court: Well, all right, it may be marked as filed, then, and [387] it can be incorporated in the defendant's answer. I think in view of the fact that it will take a bit of time to revise the instructions, we may as well recess until 2:00, and there is a possibility that the case will not be put to the jury until tomorrow morning.

Mr. Nesbett: Your Honor, just to keep the record straight, I would like to renew my motion for a directed verdict, and submit it without argument, as to the first cause of action.

Court: The motion is denied. I think that is all; ladies and gentlemen of the jury, the trial will be continued until 2:00 and in the meantime you will remember the admonitions of the Court as to your duty, and the Court will stand in recess until 2:00.

Whereupon, the Court recessed from 11:50 o'clock, a.m., until 2:00 o'clock, p.m., at which time the following proceedings were had:

Court: While the instructions of the Court are not ready, and therefore cannot be supplied to counsel, I think the rules require that before argument, the Court state what the decision is upon instructions requested. The plaintiff's first request of instructions, which I will number 1, will be given in substance, if not in those exact words.

The second will be given in substance, except the part relating—which contains these words, “The defendant, through its officer, Mr. Marshall, induced Mr. Stephenson by the promise of reducing said oral contract to [388] writing, and that acting upon such representations Mr. Stephenson severed his connections with Western Air Lines on or about the 18th day of March, 1951”—I think the jury should not be requested to pass upon it, but the last four lines of the instruction, and the first four lines will be given in substance, if not in the words. The third requested instruction by the plaintiff I do not clearly understand, and while the first two lines of it are undoubtedly the law, and the Court will give that to the jury if necessary, I do not so clearly have in mind the intent of the remainder of the instruction, so at the present moment I am not able to say that it will be given. The next instruction, No. 4, will not be given in the manner submitted. The rule of law set forth is that a witness wilfully false in one part of his testimony may be distrusted in others. The substance of the instruction, with the change that I have mentioned, will be given, perhaps more elaborately. Going now to the defendant’s requested instructions; the first one will be given in substance—some of these instructions overlap—the second will be given in substance, including the second paragraph, which apparently has no relation to the first paragraph; the second paragraph of instruction No. 2 will be given in substance, and the first paragraph will be given in substance.

The third, which overlaps the first and second, will be given in substance; the fourth will be given in substance; the fifth will be given in substance; the sixth is just a restatement of [389] what is covered by the others, and will not be given separately, but the substance of it will be covered by the other instructions. The seventh is given with some modifications—I think the gist of it will be given—and the eighth, also. Now, two other instructions were submitted this morning; the first is covered by the instructions normally given; the second is so far modified that I doubt if it can be said that the second instruction of those submitted this morning will be given. The last three lines, and the word “before,” of instruction No. 2, is contained in the Court’s instructions; the other is not embraced in the text in which it is submitted. Counsel for plaintiff may make opening argument to the jury. Would counsel prefer to have a time limit, or would you prefer not to be limited as to time?

I think there are so many details to be argued, and I do not know how far counsel wish to go into those details. It may be necessary to discuss them at some length. Unless counsel themselves wish it, no time limit will be imposed; and, incidentally, before I forget it, the case of *A. W. Stephenson v. R. W. Marshall*, No. 7210, is now set for trial on Thursday morning at 10:00 in the other branch of the Court before Judge Folta. Do counsel wish their arguments reported?

Mr. Hughes: We will waive.

Mr. Nesbett: We will waive.

Mr. Hughes: We would like to amend our complaint, as to paragraph VII—merely modification as to figures, if it can be [390] done by interlineation.

Court: It can be done by interlineation; it might entail further modification of instructions—all right; is there objection?

Mr. Nesbett: No objection.

Court: Counsel may read off the figures, if he wishes to. Plaintiff's complaint may be amended by interlineation. It begins on page 3, paragraph II of the second cause of action, as I understand.

Mr. Hughes: Paragraph VII, page 3, I guess it is. In that paragraph, the figure \$22,900.00 appears, and the figure should be \$22,100.00. At the bottom, in the second cause of action, paragraph II, the figure \$273.24 appears, and that should read \$218.36; and on the next page, \$792.48 should read \$179.31; and wages accrued and not paid to October 15th—

Clerk: September.

Mr. Hughes: Well, it's October. And \$2,695.20 instead of \$1,950.00; then, of course, the total amount is then changed from \$3,015.72 to \$3,092.87; and, likewise, the prayer should conform to the complaint—where \$22,900.00 appears, it should be \$22,100.00 in count 1; and in 2, \$3,015.72 should be changed to \$3,092.87.

Mr. Hughes then made opening argument to the jury.

Court: Court will recess for eleven minutes.

Whereupon the Court recessed from 3:14 o'clock, p.m., until [391] 3:24 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection the record will show all members of the jury present. Counsel for defendant may argue.

Mr. Nesbett: Your Honor, in our counter claim, paragraph II, we better amend by interlineation to conform with our figures, page 3 of the pleadings, paragraph II, line 5, to read now \$2,174.15.

Clerk: It now reads \$2,924.33.

Mr. Nesbett: Yes.

Mr. Nesbett then argued the case to the jury.

Court: I think we will suspend until tomorrow. Ladies and gentlemen of the jury, the trial will be continued until tomorrow morning at 10:00; in the meantime, you will remember the admonition of the Court as to your duty. I have left on the desks of counsel, copies of the instructions. Court will stand adjourned until 10:00 tomorrow morning.

Whereupon, at 4:50 o'clock, p.m., the trial of the above-entitled cause was continued until 10:00 o'clock, a.m., March 19, 1952.

Be It Further Remembered, That at 10:00 o'clock, a.m., on March 19, 1952, the trial by jury of the above entitled cause was resumed; the members of the jury panel being present and each person answering to his or her name; the parties being

present as heretofore, the Honorable Anthony J. Dimond, District [392] Judge, presiding;

And Thereupon, the following proceedings were had:

Court: Counsel for plaintiff may make closing argument.

Mr. Hughes then made closing argument to the jury.

Court: Ladies and gentlemen of the jury, it now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the

trial of the case rests upon you, because you are the triers of the facts.

2.

In this case, as in all civil cases, the burden is [393] upon the plaintiff to prove his case by a preponderance of the evidence. Preponderance of evidence means the greater weight of evidence, such evidence as, when weighed with the evidence which is offered to oppose it, has the greater convincing power in the minds of the jury. While the plaintiff is required to prove his case by the greater weight of the evidence, this does not require the plaintiff to prove any fact beyond reasonable doubt. A fact is sufficiently proved if the greater weight of the evidence, in your minds, is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

In this case the defendant asserts in its cross complaint that the plaintiff is indebted to the defendant in a substantial sum. The burden of proof is upon the defendant to prove the material averments of its cross complaint by a fair preponderance of the evidence and if the defendant fails in this respect then you may not return a verdict in favor of the defendant and against the plaintiff for recovery of any sum.



## 3.

In his first cause of action as stated in his complaint the plaintiff alleges that prior to entering into the employ of the defendant on or about September 22, 1950, the plaintiff for many years had been employed by the Western Airlines, Inc., and [394] had built up certain longevity rights in regard to pay and tenure; at the time the plaintiff entered the employ of the defendant he secured a six-months leave of absence from Western Airlines, Inc., at the expiration of which time plaintiff could either return to the employment of Western Airlines, Inc., or sever his relations therewith and lose such rights as he had with Western Airlines, Inc., by reason of longevity and tenure, all of which was known to the defendant at the time of the employment of plaintiff; that shortly before March 18, 1951, the defendant induced plaintiff to sever his connection with the Western Airlines, Inc., and defendant did through its Chairman of the Board of Directors, R. W. Marshall, promise plaintiff a contract with the Alaska Airlines, Inc., for a period of not less than two years from March 15, 1951 to March 15, 1953, at a monthly salary of \$1300.00 plus expenses while away from home, and further promised to increase such basic pay upon the completion of the certification of the Alaska Airlines, Inc., as an air carrier between the Territory of Alaska and the Continental United States; that at the request and instance of defendant acting through its Chairman

of the Board of Directors, R. W. Marshall, plaintiff did sever his connection with Western Airlines, Inc., and did remain in the employ of the Alaska Airlines, Inc., as vice-president and general manager of the corporation at a minimum salary of \$1300.00 per month plus expenses away from home, until the receipt of a letter of dismissal received [395] by plaintiff on September 15, 1951, wherein the defendant dismissed the plaintiff from its employ and refused to pay the salary at the stipulated wage mentioned.

## 4.

In his second cause of action the plaintiff alleges that at the instance and request of the defendant corporation the plaintiff did on or about the 22d day of September, 1950, enter into the employ of the defendant at the agreed and stipulated wage of \$1300.00 per month, plus expenses away from home and certain additional payments to be made by the defendant to cover the expenses incurred by plaintiff in moving his home from Redondo Beach, California, to either Seattle, Washington, or Anchorage, Alaska, subject to the direction of the defendant through the chairman of its Board of Directors, R. W. Marshall; that on September 15, 1951, the defendant dismissed plaintiff from defendant's employ and refused to pay all of the salary and expenses due the plaintiff according to the agreement between the plaintiff and the defendant; that prior to the plaintiff's dismissal from the service of the defendant corporation on Sep-

tember 15, 1951, the plaintiff had certain credits due and owing him by way of salary and expenses pursuant to the terms of his employment stated in plaintiff's complaint as follows:

|   |            |
|---|------------|
| Travel expenses February 11, 1951,<br>to August 4, 1951.....  | \$ 273.24  |
| Expenses for moving and additional<br>costs incurred at the request of the<br>Chairman of the Board of Direc-<br>tors of the defendant..... | 792.48     |
| Wages accrued and not paid to Sep-<br>tember 15, 1951.....  | \$1,950.00 |

thus making a total amount then claimed by the plaintiff to be due him from the defendant of \$3,015.72.

During the course of the trial as a result of further calculations the plaintiff claimed that the true amounts due him from the defendant are as follows:

|  |            |
|--|------------|
| Travel expenses .....                                    | \$ 218.36  |
| Moving expenses .....                                    | 179.31     |
| Wages accrued and not paid to Oc-<br>tober 15, 1951..... | 2,695.20   |
|  | <hr/>      |
| Total .....  | \$3,092.87 |

The plaintiff now asserts that the sum of \$3,092.87 is due, owing and unpaid to him from the defendant.

The defendant in its answer to plaintiff's second cause of action alleges that no sum whatsoever is due and owing from the defendant to the plaintiff

and defendant in its counter claim as pleaded alleges that during the period between September 22, 1950 and September 1, 1951, the plaintiff, while employed as an officer of the defendant corporation, wrongfully withdrew and caused to be withdrawn from the Treasury of the defendant corporation various sums in excess of his agreed salary and authorized expenses in the total amount of \$2,924.33, which amount, defendant alleges in its answer, was paid to plaintiff by defendant in error and without authority and is now due and owing from plaintiff to defendant; defendant further alleges that it has demanded that plaintiff repay to defendant such alleged excessive and erroneous overpayments but plaintiff has failed [397] and neglected to make any repayment whatever.

At the conclusion of the trial a witness for the defendant presented a statement revising the account heretofore given of the account between plaintiff and defendant and testified that the plaintiff now owes defendant the sum of \$2,174.15. Accordingly, this is the sum with which we are not concerned as demanded by the defendant of the plaintiff, over and above all just credits and offsets to which the plaintiff may be entitled.

Accordingly, we find from the pleadings the plaintiff asserted that the defendant owes him on plaintiff's second cause of action the sum of \$3,092.87, while the defendant asserts that it not only does not owe the plaintiff anything whatever but that the plaintiff is indebted to the defendant in the sum of \$2,174.15.

After all of the evidence had been offered the defendant was permitted by the Court to amend its answer by setting up two affirmative defenses to conform with what defendant asserted to be the proof in the case, and those affirmative defenses read as follows:

“Affirmative Defense

“If a two year employment contract at a monthly salary of \$1300.00 was entered into on or about March 16, 1951, between the plaintiff, Arthur W. Stephenson, and the defendant Alaska Airlines, Inc., the plaintiff wrongfully violated the terms of said contract by failing [398] to account for corporate funds advanced to and drawn by him, and by refusing and failing to submit expense reports for the period from February 11, 1951, to and including August 1951, although duly requested to do so by the Accounting Office of the defendant, and consequently the defendant was justified and authorized to discharge the plaintiff for violation of his contract of employment.

“Affirmative Defense

“The plaintiff, Arthur W. Stephenson failed and refused to fulfill the duty imposed upon him by law to seek other similar employment with due diligence in order to mitigate or lessen the damages claimed to have been suffered by him.”

All of the averments contained in the defendant's answer and counter claim and the two affirmative defenses above quoted, are denied by the plaintiff.

You should remember that pleadings are not evidence and are not to be considered as evidence.

Pleadings serve the purpose of putting before the jury or the Court the respective contentions and claims of the plaintiff and of the defendant but such pleadings are not evidence of any fact or alleged fact stated therein.

5.

The plaintiff's first cause of action, as you have been heretofore informed, is based upon an alleged oral agreement [399] made shortly prior to March 18, 1951 between the plaintiff and the defendant corporation, the latter acting by and through the Chairman of its Board of Directors, R. W. Marshall, wherein and whereby plaintiff asserts that defendant employed him for the minimum period of two years at a minimum salary of \$1300.00 per month and promised to put the contract in writing at a later date when the defendant would be given its then hoped for and expected certificate of convenience and necessity to operate an airline between Alaska and the States.

The important issue in this case as to the first cause of action is whether the plaintiff and the defendant, the latter acting through R. W. Marshall, actually reached an agreement at their meeting in New York on or about March 15 to 17, 1951, as to the terms of a contract of employment. In order for you to find that a contract of employment was made at that time, you must find that both the plaintiff and Marshall agreed as to the minimum amount of salary the plaintiff was to receive and the minimum length of time, namely, two years, that the plaintiff was to be employed. If you find that Marshall did

not agree as to the minimum salary the plaintiff was to receive, or if he did not agree as to the minimum duration of the contract, you must find that there was no contract of employment, and in that event you must bring in a verdict in favor of the defendant and against the plaintiff upon plaintiff's first cause of action. If you find that Marshall did not agree with the plaintiff [400] at the meeting in New York held on or about March 15 to 17, 1951, as to the plaintiff's salary or as to the period of his employment, and that Marshall postponed decision on the questions until after the defendant should receive a certificate to operate between Alaska and the States, then the plaintiff is not justly entitled to recover anything against the defendant upon the plaintiff's first cause of action.

An agreement to make an agreement in the future with the terms thereof not specified is not a contract at all. If you find that on or about March 15 to 17, 1951, Marshall promised the plaintiff only that in the future upon the issuance of a certificate to the defendant to operate an airline between Alaska and the States the defendant would negotiate with the plaintiff for a written employment contract with salary, length of employment and other terms then to be agreed upon, your verdict must be for the defendant on the first cause of action.

In determining whether or not a contract of employment was made on or about March 15 to 17, 1951, between the plaintiff and the defendant, the latter acting through R. W. Marshall, you may take into consideration all other facts and circumstances

relating to negotiations between the plaintiff and the defendant concerning a contract or contracts in writing, or otherwise. Even if you find that on or about the time mentioned Marshall promised the plaintiff to employ him in the service of the defendant corporation for two years at a salary as claimed [401] by plaintiff, you must nevertheless find a verdict for the defendant on plaintiff's first cause of action unless you further find that the plaintiff at the same time promised to work for the defendant for the period of two years and for a minimum salary of \$1300.00 a month, which might be increased by agreement of the parties after the issuance of the desired certificate to the defendant.

If you find that the plaintiff surrendered his employment with Western Airlines, Inc., not upon the defendant's alleged agreement to employ the plaintiff for the minimum period of two years at a minimum compensation of \$1300.00 per month, but rather as a desire to give up flying and continue in an executive position even though there was no certainty that he would retain such position for any specified length of time, your verdict must be for the defendant. In making this determination you may consider all of the circumstances of the case, including the age of the plaintiff.

If you find that a definite employment contract was made in March, 1951, between the plaintiff and the defendant, and that thereafter the plaintiff was wrongfully discharged from his employment without sufficient cause, the plaintiff is under a duty to make reasonable efforts to find other employment in



order to lessen the damages which he claims in the form of loss of compensation. If you find that the plaintiff did not make reasonable efforts to find other employment, under the circumstances disclosed by the evidence given in the trial of the case, [402] the plaintiff is not entitled to recover compensation for the period during which you find he has failed to make reasonable efforts to find other employment. In this connection you may take into consideration all of the circumstances relating to the subject, to determine whether or not the plaintiff, under the revealed circumstances, was justly obliged to seek other employment.

## 6.

If you find that the plaintiff did in fact have a contract of employment for the period of at least two years at a minimum salary of \$1300.00 per month, and if you further find that the plaintiff was wrongfully discharged from his employment then and in that event the measure of plaintiff's damages is properly the contract amount due the plaintiff for the unexpired term of the employment, minus such other earnings as he has received since his discharge and minus also what he may earn by the exercise of diligence during the unexpired term of his alleged contract. You will find by calculation that the plaintiff on his first cause of action now claims \$22,100.00. Dividing that amount by \$1300.00, which is plaintiff's claim as to his monthly salary, we find that \$22,100.00 would cover a period of 17 months.

## 7.

When one is wrongfully discharged from employment it is his duty to seek other employment and he can not just remain idle [403] for the entire period of his contract of employment from which he was discharged and then recover from his former employer the entire amount which he would have earned had he continued in the employment. The employer is entitled to a credit of whatever the employee earns or might earn with reasonable diligence during the unexpired period of the contract of employment.

## 8.

As to plaintiff's second cause of action, you have heard all of the evidence and it is for you to decide whether the defendant is indebted to the plaintiff in the amount claimed by plaintiff or in any other amount, or whether to the contrary the plaintiff is indebted to the defendant in the amount claimed by the defendant or in any other sum. It therefore becomes your duty to decide the terms of the agreement entered into between the plaintiff and defendant.

The plaintiff is entitled to all of the salary and expenses agreed to between the parties in the plaintiff's contract of employment, or thereafter agreed to by the defendant acting by and through the Chairman of its Board of Directors, R. W. Marshall, but no more. If you find that the plaintiff is entitled to any sum due and owing him from the defendant after all just counter claims and

offsets, you should return a verdict in favor of the plaintiff and against the defendant for that amount. However, if you find that the defendant has paid to the plaintiff all that it justly owes him you should return a verdict [404] in favor of the defendant and against the plaintiff. And if you find that the plaintiff is indebted to the defendant in any sum, you should return a verdict in favor of the defendant and against the plaintiff for that amount.

## 9.

Before you can find that the plaintiff is entitled to charge against the defendant the cost of making payments for the purchase of a home, or the rental of a dwelling house or the cost of purchase of clothes for his family, or the hire of a car to locate an apartment, you must find that the defendant agreed that such expenses would be paid by the defendant.

## 10.

If you find that the defendant had in force a policy, known to plaintiff, requiring its employees, including the plaintiff, to submit periodic expense reports supported by receipts showing expenses incurred on behalf of the defendant whenever possible in order to account for corporate funds advanced for expenses, and if you find that substantial sums of money were advanced by defendant to the plaintiff for expenses and that although requested to do so by the defendant's accounting office, the plaintiff failed and refused to submit his expense statements without good and sufficient cause

and for an unreasonable period of time, then you may find that plaintiff thereby violated his contract of employment in a substantial manner and you may further find that this violation of company policy, if you find that it [405] applied to the plaintiff, was sufficient grounds to justify the discharge of plaintiff from the defendant's employment.

### 11.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact,—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will at-

tach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result [406] of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

## 12.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own

intrinsic weight but also according to the evidence which it is in the power [407] of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

## 13.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

## 14.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached". To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by

the nature of his testimony, or by contradictory evidence, or by [408] evidence affecting his character for truth, honesty or integrity, or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the

facts and [409] circumstances of the case, reasonably appeals to you as the most worthy of belief.

### 15.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

### 16.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff or defendant is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.



## 17.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

## 18.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest [411] desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous; even though in so doing he adopts the views and opinions of other jurors.

## 19.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

## 20.

When you retire to consider of your verdicts you will take with you to the jury room the exhibits, these instructions and give forms of verdicts. You will thereupon elect one of [412] your members foreman who is to speak for you and sign and date the verdicts unanimously agreed upon.

The plaintiff's two causes of action are to be considered by you separately and a separate ver-

dict rendered as to each. Two forms of verdict are now given you relating to plaintiff's first cause of action. If you find for the plaintiff and against the defendant on plaintiff's first cause of action you will insert in the form of verdict which has been prepared for that purpose and which is marked Verdict No. 1 the amount which you find the plaintiff justly entitled to recover from the defendant upon plaintiff's first cause of action and you will thereupon date and sign the verdict and return the same into court as your verdict upon plaintiff's first cause of action.

If you find for the defendant and against the plaintiff upon the plaintiff's first cause of action your foreman will date and sign the verdict which has been prepared for that contingency and which is marked Verdict No. 1-A, and you will return the same into court as your verdict on plaintiff's first cause of action.

If you find in favor of the plaintiff and against the defendant upon plaintiff's second cause of action you will insert in the blank space which has been left therefor the amount which you find the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict which has been marked Verdict No. 2 and you will return the [413] same into court as your verdict on plaintiff's second cause of action.

If you find that the plaintiff is not entitled to recover from the defendant in any sum whatever on plaintiff's second cause of action, and you further find that the defendant is entitled to recover from

the plaintiff in some amount upon defendant's counter claim, you will insert in the form of verdict which has been prepared for that contingency and which is marked Verdict No. 3, the amount which you find the defendant is entitled to recover of and from the plaintiff in the space left for such insertion and your foreman will thereupon date and sign the verdict and you will return the same into court as your verdict on plaintiff's second cause of action and defendant's counter claim.

If you find that the plaintiff is not entitled to recover from the defendant in any sum whatever, and you further find that the defendant is not entitled to recover from the plaintiff in any sum whatever on plaintiff's second cause of action and defendant's counterclaim, your foreman will date and sign the verdict which has been prepared for that contingency and which has been marked Verdict No. 4, and you will return the same into court as your verdict on plaintiff's second cause of action.

With your two verdicts, one a verdict upon plaintiff's first cause of action and the other a verdict upon plaintiff's [414] second cause of action, you will also return into court the exhibits, these instructions and the forms of verdict not used by you.

Dated and signed at Anchorage, Alaska, this 19th day of March, 1952.

/s/ ANTHONY J. DIMOND,  
District Judge.

Court: I think the jury had better retire to the ante room while counsel take exception to the in-

structions. Ladies and gentlemen, as some of you doubtless know, at the conclusion of giving the instructions, under our practice, and the law, counsel for the parties may take exception to the statements of law contained in the instructions so those questions of law may be reviewed by the Appellate Court, and those exceptions, under the rules, are taken out of the hearing of the jury. Sometimes, counsel come to the bench, but in this case I think you had better be excused to the ante room while counsel take exceptions and in the meantime you will remember the admonitions of the Court as to your duty. You may retire until called.

(The jury then retired to the ante room.)

Court: Counsel for plaintiff may take exception to the instructions. Oh, by the way, I haven't given any of the requested instructions absolutely verbatim, and I have marked each of them as follows: "Refused except as covered by instructions given; exception taken", and I have signed it as District Judge; [415] I have signed each of the instructions in that fashion, and these proffered instructions will be filed and, if counsel desire, an order can be made now that upon appeal they may be incorporated in the record at this point. Perhaps it would be well to make that order anyway, without request.

Mr. Hughes: I take no exception, Your Honor, except insofar as they conflict with any of the requested instructions; right now I don't see that they do.

Court: Very well; counsel for defendant may except to the instructions given.

Mr. Nesbett: Your Honor did make that order that you discussed, then?

Court: Yes; the order will be that the requested instructions, each marked as I have indicated, will be incorporated in the record at this point, and they will be filed and become part of the record, and become part of the transcript.

Mr. Nesbett: Your Honor, we take exception to the use of the word "minimum" in the instructions, as follows: Instruction No. 3, at line 30——

Court: The first page of Instruction 3?

Mr. Nesbett: Yes; page 1 of Instruction 3; and then the words "general manager" on line 29, right above it.

Court: That is excepted to?

Mr. Nesbett: Yes, Your Honor; neither of, as being mentioned in or even inferred from the allegations of the complaint. [416]

Court: Well, the words "general manager" will be stricken, then, because this is an attempt to put before the jury what is in the complaint.

Mr. Nesbett: And the word "minimum", Your Honor.

Court: "Minimum" will stand.

Mr. Nesbett: All right——

Court: Let me look at the complaint again, counsel. Counsel is right, the word "minimum" is not in the complaint; the word "minimum" will be stricken from instruction 3, page 1, line 30, because

in that instruction an attempt is made to simplify the complaint.

Mr. Nesbett: Now, on Instruction 5, page 1, line 8, exception to the use of the word "minimum" period of two years, and "minimum" salary.

Court: That's right; this is still a reference to the complaint—no, this is not a reference to the complaint. I will strike out the words "as you have been heretofore informed", and will not strike out the words, "minimum".

Mr. Nesbett: I possibly should state some basis for my exception; as not being inferrable from the allegations of the complaint, and not supported by any evidence produced at the trial in connection with the specific use of the word in Instruction 5. And on the same page, Your Honor, at line 21, the use of the word "minimum", line 22, also; the word occurs on both lines.

Court: 26, also, I think. [417]

Mr. Nesbett: 24 and 26.

Court: Is counsel ready to proceed?

Mr. Nesbett: I just wanted to make a notation—you are going to leave those words in?

Court: Yes.

Mr. Nesbett: On the next page, Your Honor, line 30, to the use of the word "minimum" again.

Court: Yes; all of these exceptions will be noted, of course.

Mr. Nesbett: And on the next page, lines 4 and 5.

Court: Instruction 5, page 3?

Mr. Nesbett: Page 3, yes, sir, on lines 4 and 5. And in Instruction 6, line 4, to the use of the word

“minimum”. That’s all we have, Your Honor.

Court: Very well.

Mr. Nesbett: I was wondering at this time, to keep the record straight, if I might ask the Court to consider and say whether in my argument on the motion for a directed verdict—we haven’t got the transcript, and I am not certain whether the matter was brought out or not—but that the Court consider as a ground in support of the motion for a directed verdict, that incorporated in the argument was that, based on rule 41 and 50, we contend that, first, there was no evidence from which the jury could find that the plaintiff—in the first cause of action, Count II, that any contract which the jury might find upon the evidence, is void under the statute of frauds, and that under applicable law, namely New York law, the defendant cannot be estopped as asserting the statute of frauds as a defense. It was brought out definitely in two arguments I made; I just wanted it to be asserted as a grounds.

Court: Is counsel renewing the motion?

Mr. Nesbett: To the extent necessary to have those points considered as incorporated.

Court: Decision on the motion will be reserved, unless counsel for plaintiff wishes to argue. Each and all of the exceptions are noted, and the jury may be recalled. Do counsel wish to agree to a sealed verdict?

Mr. Nesbett: Yes, Your Honor, we agree.

Mr. Hughes: Yes.

Court: Give it to counsel to sign. The jury may be recalled.



(The jury thereupon returned to the court room.)

Court: Without exception, the record will show all members of the jury present. Ladies and gentlemen of the jury, as a result of conference with counsel, on Instruction 3, page No. 1, I have stricken out the words, appearing in line 29, "general manager", and in line 30, the word, "minimum"; this instruction is an attempt to condense and put before you the averments of the plaintiff's complaint as to his first cause of action; it starts out, "In his first cause of action as stated in his complaint the plaintiff alleges," and so on. Counsel has invited my attention to the fact that the words "general manager" and "minimum" do not [419] appear in the complaint at all in the first cause of action, or they do not appear in the context which is recited in Instruction 3, page 1. Those words are merely stricken out because they do not show in plaintiff's complaint. Otherwise the instructions have not been changed. The instructions may be stapled together——

Mr. Hughes: If the Court please, I believe you did make one other—I believe——

Court: Did I make one other change?

Mr. Hughes: Page 1 of Instruction 5—"as you have been heretofore informed".

Court: That's right, page 1 of Instruction 5, it is true. Instruction 1, page 5, in the middle of the page, and near the margin, I have stricken out the language, "as you have been heretofore informed" because I fear you may be confused by those words

in view of the fact that you may think it relates back to instruction No. 3. Otherwise the instructions have not been changed as a result of conference with counsel. Ladies and gentlemen of the jury, counsel have stipulated that you may return what is known as a sealed verdict. Has any member of the jury served on a jury returning a sealed verdict? Many of you have, thank you. Well, you know what the procedure is, then, but I will read the endorsement on the envelope: "Ladies and Gentlemen of the Jury: If you have not reached a verdict by 5:00 o'clock p.m., today, then when you have agreed upon a verdict, have the foreman sign the same, seal it up in this [420] envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All the jurors must be in the jury box in court at 10 o'clock, a.m. of Thursday, March 20, 1952, at which time the verdict will be handed to the Court and opened in the presence of the jury. Dated at Anchorage, Alaska, this 19th day of March, 1952. /s/ Anthony J. Dimond, District Judge. Approved, John C. Hughes of Attorneys for Plaintiff; approved, Buell A. Nesbett, of Attorneys for Defendant." May I emphasize one word of warning—if you do return a sealed verdict, please be certain that you do not say anything about the nature of the verdict until it is opened in court and read. The two alternate jurors, Mrs. Curtis and Mrs. Dintaman, are excused from further service, with the thanks of the Court; the jurors may not be composed of a greater number than twelve. You may be

excused. You will be required in Judge Folta's court next Monday morning at 10:00, and I am to draw a jury in this court next Tuesday, but Judge Folta will probably tell you that. You may now retire. Bailiff may be sworn.

(George W. Parks was sworn as Bailiff in charge of jurors.)

Court: Ladies and gentlemen, you may now retire to consider of your verdicts. You may go with the bailiff.

(Thereupon, at 11:35 o'clock, a.m., March 19, 1951, the jury retired.)

Be it further remembered that at 10:00 o'clock a.m., [421] March 20, 1952, the jury in the above entitled cause returned to the court room; all members of the jury panel being present and each answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Diamond, District Judge, presiding;

And thereupon, the following proceedings were had:

Court: Ladies and gentlemen of the jury, have you arrived at verdicts?

Foreman: We have, Your Honor.

Court: Very well; you may hand them to the bailiff. The envelope containing the verdicts is now opened in the presence of the jury. Two verdicts have been signed by the Foreman and may be read by the clerk.

The clerk then read the following verdicts:

(Title of Court, Title of Cause, No. A-7223). "We, the jury, duly sworn and impanelled to try the above entitled action, do find for the plaintiff and against the defendant upon plaintiff's first cause of action and find that the plaintiff is entitled to recover of and from the defendant upon plaintiff's first cause of action the sum of Eleven Thousand Fifty Dollars, (\$11,050.00). Dated at Anchorage, Alaska, this 19th day of March, 1952. Delbert W. Hosler, Foreman."

(Title of Court, Title of Cause, No. A-7223). "We, the jury, duly sworn and impanelled to try the above entitled action, do find for the plaintiff and against the defendant upon plaintiff's [422] second cause of action and find that the plaintiff is entitled to recover of and from the defendant upon plaintiff's second cause of action the sum of Two Thousand Six Hundred Ninety Five, \$.20 dollars, (\$2,695.20). Dated at Anchorage, Alaska, this 19th day of March, 1952. Delbert W. Hosler, Foreman."

Court: Ladies and gentlemen of the jury, you have heard the verdicts just read; are those your verdicts, so say you all?

All Members of the Jury: Yes.

Court: Does either of counsel care to have the jury polled on either verdict?

Mr. Nesbett: I believe I would, Your Honor, please.

Court: On both of them or just one?

Mr. Nesbett: Both.

Court: The clerk may poll the jury on both verdicts.

Clerk: Mrs. Ken Laughlin, are the verdicts which have just been read your verdicts?

Mrs. Laughlin: Yes.

Clerk: Winifred W. Stewart, are the verdicts which have just been read your verdicts?

Mrs. Stewart: Yes.

Court: Remember, this applies to both verdicts.

Clerk: Daniel H. Cruz, are the verdicts which have just been read your verdicts?

Mr. Cruz: Yes, Ma'am.

Clerk: Toiva Uutela, are the verdicts which have just been [423] read your verdicts?

Mr. Uutela: Yes.

Clerk: Kathryn Gill, are the verdicts which have just been read your verdicts?

Mrs. Gill: Yes.

Clerk: Fred Nelson, are the verdicts which have just been read your verdicts?

Mr. Nelson: Yes.

Clerk: Bertha Perrine, are the verdicts which have just been read your verdicts?

Mrs. Perrine: Yes.

Clerk: Leonard M. Johnson, are the verdicts which have just been read your verdicts?

Mr. Johnson: Yes.

Clerk: Delbert W. Hosler, are the verdicts which have just been read your verdicts?

Mr. Hosler: Yes.

Clerk: Barbara J. Lydick, are the verdicts which have just been read your verdicts?

Mrs. Lydick: Yes.

Clerk: E. F. Bittner, are the verdicts which have just been read your verdicts?

Mr. Bittner: Yes.

Clerk: Calvin R. Cantrell, are the verdicts which have just been read your verdicts? [424]

Mr. Cantrell: Yes.

Court: On being polled, the jury has affirmed that the verdicts as read are their verdicts. The verdicts may be received and filed and entered, and the forms of verdicts not used may be filed, and the envelope containing the sealed verdicts may be filed, also. Thank you for your services, ladies and gentleman of the jury; you are now discharged from further service in this particular case and you will report in the main court room of the court in the Federal Building for further service next Monday morning at 10:00 o'clock, a.m. You may now retire.

(Thereupon, at 10:10 o'clock, a.m., March 20, 1952, the trial by jury of the above entitled cause was concluded.)

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PLAINTIFF'S EXHIBIT No. 16

[Letterhead of Alaska Airlines, Inc.]

Mr. A. W. Stephenson, Sept. 20, 1951  
710 East Third Street, Anchorage Alaska.

Dear Mr. Stephenson:

Mr. Finck of our Accounting Department who came here at your request bringing papers in connection with your account tells me that the analysis

## Plaintiff's Exhibit No. 16—(Continued)

showing a balance due Alaska Airlines Inc. after paying your August salary was \$7623.74 and that you agreed with him that this was a proper balance.

Mr. Finck has also handed to me a number of expense sheets submitted by you yesterday dated February 11, 1951 to September 1, 1951 totalling \$4828.89 which leaves a balance due us of \$2794.85.

We hereby make formal request that you repay to the Company \$2794.85 which you had advanced to yourself by the Anchorage office without the knowledge or consent of our Treasury or of me. In the event that this money is not returned to the Company prior to September 28, 1951, we seem ot have no choice but to turn the matter over to counsel for attention.

The arrangement that I made with you when you first became associated with the Company provided for a salary of \$1000 per month plus \$300 per month to cover your added cost for living expenses prior to the time you moved your family to Anchorage. Our Accounting Department advises me that you later instructed them to change your salary check from \$1000 per month to \$1300 per month. You did this without my knowledge or consent.

Our Accounting Department also informs me that certain of your Expense Accounts submitted and credited to you include living expenses while you were receiving \$300 per month for this purpose. I will secure these vouchers when I again reach Everett and write to you further.

In casually glancing through your Expense sheets

## Plaintiff's Exhibit No. 16—(Continued)

we note the following items charged by you for which there appears to be not the slightest support and obviously they deserve a more careful check.

|                        |          |                    |          |
|------------------------|----------|--------------------|----------|
| March 1951:            |          | March 1951         |          |
| 11, Telephone          | \$ 10.10 | 28, 25% of \$86.25 | \$ 23.06 |
| 14, Telephone          | 12.78    | 29, Meals          | 16.70    |
| 17, Meals              | 9.85     | 29, Hotel          | 8.50     |
| 25, Air Fare           | 113.40   | 30, Hotel          | 10.76    |
| 25, Meals              | 27.30    | 30, Meals          | 31.50    |
| 26, Meals              | 68.45    |                    |          |
| April 1951             |          | April 1951:        |          |
| 17. NWA 2nd Fare       | \$172.50 | 21, Meals          | \$ 29.46 |
| 20, Meals              | 14.75    |                    |          |
| May 1951:              |          | May 1951:          |          |
| 2, Meals               | \$ 14.75 | 23, Meals          | \$ 15.90 |
| 3, Meals               | 17.05    | 24, Meals          | 20.60    |
| 4, Meals               | 29.20    | 26, Telephone      | 9.60     |
| 20, Telephone          | 9.48     | 26, Meals          | 21.07    |
| June 1951:             |          | June 1951:         |          |
| 5, Meals               | \$ 18.65 | 21, Meals          | \$ 16.10 |
| 6, Meals               | 17.94    | 22, Meals          | 20.55    |
| 7, Meals               | 24.25    | 23, Auto           | 15.66    |
| 8, Meals               | 26.80    | 25, Meals          | 17.95    |
| 17, Electric Light for |          | 27, Meals          | 14.10    |
| House                  | 42.75    | 28, Meals          | 14.05    |
| 19, Meals              | \$27.35  | 30, Meals          | 18.94    |
| 20, Meals              | 20.00    |                    |          |
| July 1951:             |          | July 1951:         |          |
| 5, Meals               | \$ 12.02 | 16, Meals          | \$ 13.45 |
| 6, Meals               | 15.05    | 17, Meals          | 15.55    |
| 7, Meals               | 19.70    | 23, Meals          | 32.45    |
| 7, Telephone           | 10.48    | 27, Hotel          | 8.00     |
| 7, Auto Exp.           | 10.75    | 28, Hotel          | 11.29    |
| 14, Auto Exp.          | 23.16    | 28, Meals          | 30.70    |
| August 1951:           |          | August 1951:       |          |
| 8, Meals               | \$ 77.00 | 11, NWA ticket     |          |
| 9, Meals               | 41.20    | charged to ASA     | \$120.75 |





Defendant's Exhibit "C"—(Continued  
the payroll and have been accumulating \$1300 per  
month since that time in the hope of securing a sat-  
isfactory explanation from you, but in view of the  
long time that has elapsed and your continued  
silence we seem to have no choice but to tell you  
that as of this date we are removing your name  
from the payroll.

Yours very truly,

ALASKA AIRLINES, INC.  
R. W. MARSHALL,  
Chairman

RWM M S

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[Endorsed]: No. 13,494. United States Court of  
Appeals for the Ninth Circuit. Alaska Airlines, Inc.,  
a Corporation, Appellant, vs. Arthur W. Stephen-  
son, Appellee. Transcript of Record. Appeal from  
the United States District Court for the Territory  
of Alaska, Third Division.

Filed: August 18, 1952.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 13,494

ALASKA AIRLINES, INC., Appellant,

vs.

ARTHUR W. STEPHENSON, Appellee.

## DESIGNATION OF POINTS

### First Cause of Action

Appellant designates the following as points upon which he intends to rely:

1. That the evidence is insufficient to establish a contract between the parties, written or oral.

2. That the alleged contract was within the Statute of Frauds, and defendant is not estopped to assert its invalidity upon that ground.

3. The evidence establishes that plaintiff had made no effort to mitigate damages and, therefore, any recovery for other than nominal damages was improper.

4. The verdict is contrary to the law and the evidence.

5. That the trial court erred in denying defendant's motion for a directed verdict in favor of defendant as made at the close of plaintiff's case and as renewed at the close of all the evidence.

6. That the trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

### Second Cause of Action

1. Plaintiff failed to establish a contract with the defendant to reimburse him for installments paid in the purchase of real property in Anchorage, Alaska, in the aggregate amount of \$2,000.00.

### Designation of Contents of Record

Appellant desires the entire record printed in this case with the following exceptions:

1. Defendant's Exhibit "A".
2. None of the reporter's transcript with the exception of pages 5 through 108; pages 119 through 123; pages 135 through 147; pages 203 through 205; pages 316 through 426.

McCUTCHEON & NESBETT,  
Attorneys for Appellant,

/s/ By BUELL A. NESBETT

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 25, 1952. Paul P. O'Brien.  
Clerk.

No. 13494

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United States  
Court of Appeals  
for the Ninth Circuit.

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ALASKA AIRLINES, INC., a Corporation,  
Appellant,

vs.

ARTHUR W. STEPHENSON,  
Appellee.

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Supplemental  
Transcript of Record

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Appeal from the United States District Court  
for the Territory of Alaska,  
Third Division

FILED

JUN 10 1953

PAUL F. O'BRIEN  
CLERK



No. 13494

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**United States  
Court of Appeals**  
for the Ninth Circuit.

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ALASKA AIRLINES, INC., a Corporation,  
Appellant,  
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**Supplemental  
Transcript of Record**

---

**Appeal from the United States District Court  
for the Territory of Alaska,  
Third Division**





## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court for the District of Alaska,  
Third Division

No. A-7223

ARTHUR W. STEPHENSON,

Plaintiff,

vs.

ALASKA AIRLINES, INC., a Corporation,  
Defendant.

TRANSCRIPT OF PROCEEDINGS

\* \* \*

A. W. STEPHENSON

Cross-Examination

By Mr. Nesbett:

Q. Mr. Stephenson, you testified, didn't you, that you submitted expense reports, or weekly report vouchers? A. Right.

Q. I will ask you if you can identify this stack—it is my idea, your Honor, to offer them all as one exhibit if we can identify the documents. Disregarding the check and the top sheet, do you recognize, for example, that report?

A. It doesn't have my signature.

Q. Will you look at the top of the page and see if you recognize that handwriting?

A. Yes; that is my handwriting.

Q. Then, can you say that aside from the red marks made on there that this is the report you submitted as covering that date?

(Testimony of A. W. Stephenson.)

A. No, there are additions—wait a minute—yes, it is.

Q. And that is for the date February 11 to 17, 1951? A. Right.

Q. Now, on this one, aside from the yellow sheet on top and these [123\*] two checks, can you identify that document? A. Yes.

Q. Well, is that your expense report covering the date March 11 to 17, 1951?

A. That's right.

Q. And disregarding again the yellow sheet and the two checks, can you identify that one?

A. That's right; with the exception of the red.

Q. And that would be the expense report dated March 24 to March 30, 1951?

A. That's right.

Q. And then, using the same method—

A. Yes.

Q. And that would be the report covering March 31 through April 6, 1951, would it not?

A. That's right. May I say—just a minute, please—I call counsel's attention to the fact that there is a hotel bill of yours in there.

Q. Buell A. Nesbett; we were buddies that night, weren't we? A. Yes.

Q. That would be the report covering March 31 to April 6, 1951? A. Right.

Q. And can you identify that one?

A. Yes.

(Testimony of A. W. Stephenson.)

Q. And is that the report submitted by you covering the period [124] April 7 through April 13, 1951?      A. Yes.

Q. And this one, Mr. Stephenson?  
A. Yes.

Q. That being the report covering the period April 14 through April 21, 1951?      A. Right.

Q. Now, Mr. Stephenson, the stubs and hotel bills and whatnot, tacked on to these, are supporting vouchers submitted by you with the report, are they not?      A. Right.

Q. And can you identify this one, Mr. Stephenson?      A. Yes.

Q. And that would be expense report covering April 21 through April 27, 1951, wouldn't it?

A. Right.

Q. And this one, Mr. Stephenson?

A. Yes, that's right.

Q. This report being expense report covering period April 28 through May 4, 1951?

A. Yes.

Q. And this one?      A. Yes.

Q. This report covering the period May 13 through May 19, 1951?      A. Yes. [125]

Mr. Hughes: Excuse me, sir; the last one was April 28 to May 4, and the next one is what?

Mr. Nesbett: May 13 through May 19.

Q. And that one, Mr. Stephenson?

A. That's right.

Q. This report covering the period May 20 through May 26, 1951?      A. Yes.

(Testimony of A. W. Stephenson.)

Q. And this one? A. That's right.

Q. Covering the period June 3 through June 9, 1951; and in all of these reports, the red pencil marks on the report are not yours?

A. Yes; they are their notations.

Q. Any of the red pencil marks, we will say. And this one? A. That's right.

Q. And this is the report covering the period June 16 through June 23, 1951, is it not?

A. That's right.

Q. And this one, Mr. Stephenson?

A. This has additional—not only red but other pencil marks, too.

Q. What type of marks are on that page that you did not make?

A. Those marks; that pencil.

Q. Then we can state that all marks other than the blue in your writing, and figures, are those of someone else? A. And the blue pencil. [126]

Q. This report covers the period June 24 through June 30, 1951? A. Yes.

Q. And this one?

A. There is some confusion in these hotel receipts.

Q. There is some confusion?

A. It would depend on the succeeding one—no, the next one—it's all right provided the next one goes back to that one for hotel support.

Q. Does it do it? A. Yes; it's all right.

Q. Then, the first of the two reports we have been discussing would be the report covering the

(Testimony of A. W. Stephenson.)

period July 8 through July 15, 1951, which you have identified, and the second one would be the report covering the period July 1 through July 7, 1951, which you also identified. Now, here's another one.

Mr. Hughes: Did counsel give those out of order, or was that the way they came?

The Clerk: They are out of order.

Mr. Hughes: If it is your intention—I just wanted to know.

Mr. Nesbett: It wasn't intentional, no. July 1 through July 7 and July 8 through July 14 have been identified; I'm sorry.

A. The hotel bill for this one must have been put on that one.

Q. Well, that is your report, though, isn't it?

A. Right. [127]

Q. Covering the period July 15 through July 21, 1951. And I hand you another one. A. Yes.

Q. That is the report covering the period July 22 through July 28, 1951. And this one?

A. Yes.

Q. Being the report covering period July 29 through August 4, 1951. I hand you another one.

A. Yes.

Q. Report covering period August 5 through August 11, 1951. This is the last one; this last report is dated September 1, 1951, and apparently written in your handwriting and signed by you; is that correct? A. That's right.

(Testimony of A. W. Stephenson.)

Mr. Nesbett: Maybe I should have these marked for identification at this time.

The Court: Perhaps counsel for plaintiff will not object to their introduction.

Mr. Nesbett: Subject to identification of checks and other documents by another witness that I will call—that's the only——

The Court: Do you wish to put them in now?

Mr. Nesbett: Yes; the whole group as one exhibit.

Mr. Hughes: Subject to identification later of the attachments you have referred to each time.

The Court: They may be marked for identification; Defendant's Exhibit A. [128]

Mr. Hughes: Did the last one cited cover any specific period? You just said September 1st.

Mr. Nesbett: It is just expense account dated September 1st, John.

The Clerk: Twenty, is that right?

Mr. Nesbett: I hadn't counted them.

Q. Mr. Stephenson, you testified, did you not, that you had never made any order in connection with the submission of expense accounts by employees, didn't you?

A. I did not; I testified that I had given instructions concerning per diem vouchers, usually submitted by the flight crews.

Q. Well, didn't you testify that the only company order made was issued by Mr. Marshall, and then introduce it in evidence?



(Testimony of A. W. Stephenson.)

A. I don't believe I testified it was the only company order.

Q. Will you state again what your order pertained to in connection with per diem?

A. Well, I would have to say—I can't remember just what all it contained in it, but the principle of the thing was requiring them to be more neat and accurate in reporting.

Q. In that connection didn't you issue an order in Anchorage for employees to report more accurately the arrival and departure time in connection with hotels; isn't that your only order?

A. No; it had nothing to do with hotel bills.

Q. Per diem? [129]

A. They got eight hours a day and the day is divided into quarters and it depends on accurate reporting of the hours of arriving and departing to get an accurate figure for the Accounting Department on which to pay per diem.

Q. You did issue such an order, didn't you, in Anchorage?      A. Yes.

Q. Did you issue such an order at Paine Field, or in Everett, Washington?

A. I may have; I don't know.

Q. As a matter of fact, didn't you have a conversation with Mr. Baruth, Assistant Secretary and Treasurer, in the month of October concerning submission of expense reports?      A. I might have.

Q. And in that conversation didn't you issue a direct order to Mr. Baruth that no expense reports

(Testimony of A. W. Stephenson.)

were to be honored unless substantiated by vouchers in all respects?

A. If I did issue such instructions, it was merely reminding employees at Mr. Marshall's instructions in the matter.

Q. Well, then, you could have issued such an instruction to Mr. Baruth and could have forgotten it in the meantime? A. Right.

Q. Actually, Mr. Marshall's instructions were that that was to be done, also, weren't they?

A. Outside of the bulletin in the way of written instructions from Mr. Marshall—I think that's all I have ever seen from [130] him.

Q. Now, from the date of commencement of your employment until early in February, thereabouts, you submitted verified expense reports, did you not, to the company? A. I did, yes.

Q. Were all of those expense reports honored? A. Yes.

Q. As a matter of fact, Exhibit 6, the recap that you submitted, shows that a number of them were honored, doesn't it? A. Right.

Q. And did you submit supporting vouchers on those expense reports? A. I did.

Q. Did you testify that you learned some time early in February that some of your supporting vouchers had become detached, or lost, from the expense reports?

A. I found that the voucher at Paine Field would be merely a statement of the voucher number and the amount, and that all of the supporting

(Testimony of A. W. Stephenson.)

papers, or part of the supporting papers, wouldn't be there.

Q. Do you recall the approximate date in February that you learned that?

A. No, I don't; it would be on the occasion of a visit down there, when I was there.

Q. Did you testify that after you learned that that situation [131] existed you refused to submit your expense reports from that time on?

A. I did not refuse to submit my expense reports at any time. I insisted that I have a statement and that my account be brought up to date and the supporting papers be in the proper files in Everett.

Q. It is a fact, isn't it, that after some date prior to February 11, 1951, you did not submit any further reports until September 19, 1951?

A. Right.

Q. That would be some time after you had severed connections with the company?

A. No—well, it would be after I was relieved from duty, yes.

Q. Now, can you tell me which supporting vouchers, or type of supporting vouchers you found had become detached or removed from your expense reports in February?

A. Well, I believe it was the hotel bills and the voucher itself—the expense statement as prepared by myself.

Q. Well, actually, though, you were paid on those reports, weren't you?

(Testimony of A. W. Stephenson.)

A. I learned that I had been paid on that, on the 19th of September, yes.

Q. Given credit?           A. Yes.

Q. And were you particularly concerned when you learned that the [132] hotel bills and supporting vouchers were being handled in a method that caused them to be removed from the expense report?

A. Yes; for any length of time. They are part of the support of a corporation's records and they should be in their proper place.

Q. Did you issue any order to Mr. Baruth, the Treasurer, in that respect?

A. Mr. Baruth was not working for me.

Q. Well, is that, Mr. Stephenson, the only reason you didn't submit your expense reports from that time onward?

A. That and, as I say, they wouldn't give me a statement of my account.

Q. Isn't it a fact that Mr. Baruth, as Assistant Treasurer, kept a certain IBM Machine card, or something of that nature, that you could demand to see at any time?           A. Yes.

Q. And it would be your privilege, wouldn't it, to call on Mr. Baruth at any time and ask him to produce the card and check it with your expense report?

A. You couldn't tell from the card itself what vouchers it referred to necessarily, because the vouchers were given a number and lost their iden-

(Testimony of A. W. Stephenson.)

tity so far as for a certain period of time or certain portion or anything else.

Q. Then, let's put it this way: if you had submitted your expense reports monthly, it would have been possible, for example, to [133] check that month or some other month's expenses on the card, wouldn't it?       A. No.

Q. You mean you couldn't have gotten together with Mr. Baruth and gone over it?

A. I mean for the many months; there was no use of the IBM machine for recording that at all.

Q. You didn't submit any for a number of months, as a matter of fact, did you?

A. I had them ready to submit.

Q. Did you do anything about it when you found that the supporting vouchers were being removed?

A. Nothing further; I have already stated that the vouchers should be kept in the files.

Q. Mr. Baruth, as a matter of fact, did ask you on many occasions during the period February 11 to September 19th to submit your reports, did he not?       A. Not on many; two or three.

Q. He asked you on quite a number of occasions, didn't he?

A. Not quite a number; two or three.

Q. Two or three. I will show you a copy of Exhibit 15—the copy that was given to me, your Honor—that is a recap prepared by you showing a total of \$4,072.06 as moving or additional expenses?

A. That's right. [134]

(Testimony of A. W. Stephenson.)

\* \* \*

Q. You knew the company procedure in connection with expense reports—I mean how they were handled after submission?

A. I don't know what you mean.

Q. Well, isn't it a fact that upon submission they were forwarded to the Treasury Department at Paine Field, Everett, Washington, and audited there?      A. Yes.

Q. And after audit, possible some items might be disallowed, and a final figure agreed upon by the Treasury and allowed as legitimate expenses?

A. I don't know what you mean agreed upon by the Treasury.

Q. In other words, wouldn't they compare your report with their knowledge of the regulations of the company, and allow some amounts as reasonable and disallow some items?

A. Usually when they did that they sent the voucher back for confirmation, depending whether or not it was an officer of the company—who it was.

Q. When you submitted these expense reports on September 19th, [147] you knew as a matter of procedure they would be sent to Everett to be audited, didn't you?      A. Yse.

Q. And that if submitted on September 19th, it might be three or four days before they reached the Accounting Department in Everett?

A. There was no necessity for it; Mr. Fink put them in his brief case and left town.

(Testimony of A. W. Stephenson.)

Q. Well, in the natural course of events it would at least be two or three days before they got to the Accounting Department, wouldn't it?

A. Not necessarily, no.

Q. Well, two days?

A. Yes; possibly two days.

Q. And it would take, for that stack of reports, some little time to audit them? A. Yes.

Q. And until they had been audited, there could hardly have been a variance between you and any of the officials concerning amounts involved, could there?

A. Yes, they might have been entirely agreeable to discuss the amounts and the justification for them at the time they were submitted, and I expected to do so.

Q. You offered to meet with them in the future and discuss the amounts with them, didn't you, and submit vouchers for the [148] additional expenses?

A. I offered to for the moving costs and living costs.

Q. Well, as a matter of fact, what I am getting at—didn't you commence this suit before Alaska Airlines would have conceivably had time to audit the reports and sit down and discuss the thing with you intelligently?

A. I believe I received a communication from Mr. Marshall disallowing certain portions of this report. I believe that is what prompted me to file suit.

Q. Will you please answer my question—didn't

(Testimony of A. W. Stephenson.)

you commence this suit before Alaska Airlines, in the usual routine, could conceivably have audited these reports and communicated with you?

A. I did not.

Q. You will have to admit that between the time of arrival in Everett and the commencement of this suit was a very short interval of time, probably two or three days, wasn't it?

A. One week.

Q. From the time of submission in Anchorage—

A. That's right; it was in the evening and they were in Everett the next morning.

Q. Did you go in and have the attorney prepare the suit and file it, all on the 26th day, or did you go in two or three days ahead of time and have him draw this thing up?

A. No; I didn't go in ahead of time. [149]

Mr. Nesbett then read Defendant's Exhibit B to the jury.

Q. Now, Mr. Stephenson, you received that letter, didn't you?      A. Right.

Q. Is it still your testimony that as of September 19th or on the dates thereafter you were not certain of your status with the company?

A. That's right; as I repeated before, I don't know whether the minutes show but what I might still be an officer.

Q. Do you consider it very likely, in view of what happened?      A. I want to know.

Q. Is that the reason you haven't attempted to obtain other employment?



(Testimony of A. W. Stephenson.)

A. It would be one of the reasons, yes.

Q. Was it your testimony that the agreement between you and Mr. Marshall at the time of commencement of your employment was that you were to receive a straight \$1,300.00—is that correct?

A. Correct.

Q. And that he later said it should be \$1,000.00 a month and \$300.00 for expenses?

A. Right.

Q. For tax reasons?           A. Right.

Q. And you refused?           A. Right.

Q. I will ask you whether you ever had a discussion with the [150] Treasury in Everett, Washington concerning the amount of your monthly pay?           A. Yes, I think I have.

Q. As a matter of fact, didn't they show you a memorandum from Mr. Marshall that your pay was to be \$1,000.00 a month plus \$300.00 to cover additional expenses during the time you maintained two homes?           A. No.

Q. Did you ever have occasion to discuss the matter with one Mr. Jacobson in Everett?

A. Yes.

Q. And wasn't that discussion in connection with the very matter that I am talking about—\$1,000.00 plus \$300.00 — rather than \$1,300.00 straight?

A. He said that Mr. Marshall had sent that suggestion out to Everett, but I never saw any communication on it and I informed Mr. Jacobson that if Mr. Marshall had in mind any change in the ar-

(Testimony of A. W. Stephenson.)

rangement of my pay it was a matter between him and I—Mr. Marshall and myself.

Q. Didn't you at that time order them to put you on the payroll at a straight \$1,300.00—

A. I had no authority; that was Mr. Marshall's prerogative.

Q. I know, but didn't you issue such order at that time?      A. I did not.

Q. You know as a matter of fact that Mr. Jacobson checked back [151] with Mr. Marshall, didn't he, on that point?

A. I don't know about that.

Q. And obtained a memorandum from Mr. Marshall?      A. I don't know.

Q. Is it your testimony that Mr. Marshall was so concerned about your personal affairs that he later, after making an agreement for straight \$1,300.00, later said, "We will make it a thousand and you can save a lot of money, and have \$300.00 for expenses"?

A. No; I think Mr. Marshall was concerned about what saving he could effect to the company—not me.

Q. What saving could he possibly make to the company?

A. Because then certain expenses charged to me I would have it going off on tax matters.

Q. But in any event it is costing the company \$1,300.00 which they can write off as operating expenses, isn't it?      A. Yes.

Q. Then the only alternative is to believe that

(Testimony of A. W. Stephenson.)

Mr. Marshall was so concerned about your saving money on taxes that he trumped this scheme up?

A. Yes, as far as taxes, and another way to reduce my base salary—that was another——

Q. You mean he attempted to reduce your base salary that way?

A. Well, I figure that would be a start at an attempt at reduction.

Q. But you would have us believe in March of 1951 he is [152] quite willing, and the minimum was going to be \$1,300.00?

A. Yes, and he was quite willing at that time to leave the \$1,300.00 appear straight salary, too.

Q. How do you account for all this interim jockeying around?

A. I don't understand your question.

Q. Well, his change of mind; first at \$1,300.00, then suggesting \$1,000.00 plus \$300.00, then he changes his mind again.

A. I don't know what goes on in Mr. Marshall's mind; I know what happened in the payroll records.

The Court: I think we will suspend now. Ladies and gentlemen of the jury the trial will be continued until tomorrow morning at 10:00. In the meantime you will remember the admonitions of the Court as to your duty not to discuss the case among yourselves or with others, or not to listen to anything from others, nor read about it. May I give you a special warning, because it is written in the law, and that is that you do not discuss the

(Testimony of A. W. Stephenson.)

case among yourselves while you are sitting as a jury here until it is finally submitted to you. It is a natural, human thing for two members of the jury for one to say to the other, "What do you think of this?" and so on; the law forbids it—I suppose with good reason; therefore refrain from discussing the case among yourselves. I am not alarmed that you are going to talk to somebody on the street about it—that would be awful but the law says you should not discuss it between yourselves until you go to the jury room; then you can discuss it all you [153] want to. You may retire and the trial will be resumed at 10:00 tomorrow morning.

(Whereupon, at 4:40 o'clock, p.m., March 13, 1952, the trial of the above-entitled cause was continued.)

(Be It Further Remembered, that at 10:00 o'clock, a.m. on March 14, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, the Honorable Anthony J. Dimond, U. S. District Judge, presiding; And Thereupon, the following proceedings were had.)

The Court: The witness may resume the stand; counsel may proceed with examination.

Mr. Nesbett: Your Honor, I am sorry but I

(Testimony of A. W. Stephenson.)

think I neglected to have Mr. Stephenson identify one or two checks that are attached to each of those——

The Court: You may proceed now.

Q. (By Mr. Nesbett): Mr. Stephenson, I hand you the expense report covering February 11 through 17th, which you have previously identified with the exception of the recap sheet on the front and the two checks; would you look at those checks and determine whether or not your signature is on them? A. Yes.

Q. And this report covering the period March 11th through 17th, [154] 1951; is that your signature? A. Yes; that is my signature.

Mr. Hughes: What was the first one?

Mr. Nesbett: February 11th through 17th, and March 11th through 17th have been identified.

Q. March 24th through March 30th, with two checks. A. Yes.

Q. And March 31st through April 6th—well, there is no check on that. And the next is April 7th through April 13th with one check.

A. That is not mine; I didn't sign that check. The signature is Elsie M. Brislawn.

Q. That is not your signature on the back, where it says A. W. Stephenson?

A. No.

Q. Do you recall that check, Mr. Stephenson?

A. Yes; that is a petty cash check.

The Court: Is that your signature on the back of it?

(Testimony of A. W. Stephenson.)

Mr. Stephenson: No; it was endorsed for me.

The Court: Mrs. Brislawn, what was she in the organization?

Mr. Stephenson: She's an Assistant Treasurer and that check is on the petty cash account in the Union Bank.

Q. It is made payable to A. W. Stephenson, dated April 9th in the sum of \$400.00, signed by Elsie M. Brislawn, endorsed on the back deposited to the credit of A. W. Stephenson, by [155] Union Bank of Anchorage, signed A. W. Hassman; could you tell us where that money eventually ended up—it was deposited to your account, wasn't it?

A. The check so states; it was deposited to my account.

Q. Expense account covering the period April 14th through April 20th has two checks attached.

A. One has my signature; the other is the same as the previous check.

Q. The one dated April 19th in the sum of \$100.00 has your endorsement on it, doesn't it?

A. Right.

Q. And the one dated April 16th in the sum of \$300.00 is marked on the back deposited to the credit of A. W. Stephenson by Union Bank of Anchorage, signed by A. W. Hassman; that would have gone in your account, wouldn't it, Mr. Stephenson?

A. Right.

Q. Expense account covering period April 21st through April 27th, with one check attached.

A. Yes; that is my signature.

(Testimony of A. W. Stephenson.)

Q. Expense account of April 28th through May 4th has no checks attached. Account covering the period May 13th through May 19 has one check attached.

A. Yes; this voucher belongs to me.

The Court: Is the signature on the back yours?

Mr. Stephenson: My signature is on the [156] check.

Q. Somehow or other in the procedure this voucher wasn't removed when it should have been, I suppose?

A. The reason, I believe, is that it was made to purchase a draft and the voucher wasn't attached.

Q. The account covering the period May 20th through May 26th has no checks. The account covering the period June 3 through June 9 has one check.

A. Yes; that is my signature.

Q. This has been identified; report covering period June 16 through June 23, which has five checks attached.

A. These three don't have my signature; as a matter of fact, all of these checks that I have identified, except the two that don't have my signature, were all double name checks; they have myself and the Assistant Treasurer of the corporation.

Q. Now, all right, for example, a check dated June 22, 1951, No. 12320, in the sum of \$200.00, indicates it was made payable to the order of A. W. Stephenson and signed by Mr. Mehl and Mr. Baruth; wasn't it endorsed by you on the back, Mr. Stephenson?

(Testimony of A. W. Stephenson.)

A. Yes, it was endorsed by me; I didn't state they weren't endorsed.

Q. I misunderstood you; all three of those?

A. They were endorsed by me.

Q. Now, there's two here that—those are your signatures, aren't they, Mr. Stephenson? [157]

A. Yes; they are my signatures.

Q. Then, all the monies represented by these checks were received by you for some purpose or other, weren't they?      A. Yes.

Q. And the five checks covering the period June 16th through June 23rd have been identified. Report covering June 24th through June 30th, one check.

A. This check was not signed by me and it was endorsed by my wife.

Q. Oh, it is made payable to Mrs. A. W. Stephenson and endorsed by her?

A. That's right.

Q. Report covering period July 1 through July 7 has no checks; nor has the report covering July 8 through July 14 any checks; nor the report July 15 through July 21. The report covering the period July 22 through July 28, one check.

A. Yes; that is my signature.

Q. Which has been identified. Report, July 29 through August 4 has no checks attached, nor has the report, August 5 through August 11; nor has the final expense report dated September 1, 1951—no check attached. Mr. Stephenson, did you testify in response to one of Mr. Hughes' questions that



(Testimony of A. W. Stephenson.)

on September 19th you gave Mr. McMahon a statement of the moving expenses and additional expenses that had accrued up to September 19th?

A. I read him a statement and he copied it in his own handwriting. [158]

Q. Can you recall what you read from in order to cause him to write down a statement of those expenses?       A. Yes.

Q. What was it?

A. It was a statement I had made up in my own handwriting on a scratch pad.

Q. I believe you testified, didn't you, that the sum at that time was approximately \$1,324.00?

A. Right.

Q. Did you have supporting vouchers for that statement at that time?

A. Yes, I had them, except in the case where there were checks that I hadn't received in my bank statements.

Q. Do you have that statement that you prepared, now, Mr. Stephenson?

A. Yes, I believe so.

Q. Do you have it here in court?

A. I believe so.

Q. I wonder if I could see it, please.

The Court: You may step down.

(Witness procures statement.)

A. Here it is.

Q. Is this a carbon copy, Mr. Stephenson?

A. It may be; it was made with a ball point pen

(Testimony of A. W. Stephenson.)

and I don't know whether it is a carbon copy or the original. [159]

Q. There is no way of telling between the two?

A. The only way you could determine which was which——

Q. You state you had at that time supporting vouchers to support this statement?

A. Yes, except the cancelled checks that might be in the process of clearing through the bank and being in the bank statements.

Q. Didn't Mr. McMahan ask you for those vouchers on September 19th?

A. He may have—I don't know—I don't remember whether he did or not.

Q. Now, the purpose of exchanging accounts on September 19th was to determine how you stood with Alaska Airlines, wasn't it?

A. That was my purpose.

Q. And when you discussed the matter of these moving expenses and additional expenses with Mr. McMahan, didn't he tell you, "Give us the vouchers so we can have an accounting"?

A. He made a statement in that respect and I advised him, after he and Mr. Fink had advised me they had no authority to make any settlement with me or make any agreement, I told them whenever Alaska Airlines had someone available who had authority, that I would submit whatever vouchers or statements they requested.

Q. But you did turn in your statements and vouchers in connection with all your other expenses

(Testimony of A. W. Stephenson.)

covering the period February [160] 11th to September 1st, didn't you, at that time?

A. I turned them in on the promise I would be given a receipt for them and they would match the amounts of each weekly statements, and that the vouchers were attached—they were normally in order.

Q. Did they refuse to give you the same type of receipt for your statement and vouchers in connection with moving and other expenses?

A. I don't know; after they told me they had no authority to make any settlement I don't know that the discussion went any further.

Q. Well, with respect to the vouchers you did turn in, all they did was type a list of the amounts and give you a receipt—there was no assurance you were going to get that amount, was there?

A. It was an assurance to me that they had received the vouchers and statements and that they were for that amount.

Q. Couldn't you have included this additional and moving expense, with vouchers, and obtained a receipt for them, likewise?

A. I could, but I declined to do it when I found they had no authority to make any settlement or accept the statement as a true account, or approve the statement.

Q. Well, they had no authority to approve those other reports either, did they, until they were audited?

(Testimony of A. W. Stephenson.)

A. I don't know about that; they said they didn't have. [161]

Q. I mean with respect to the expense reports—they had no more authority to approve those the minute they received them in their hands than they would have to approve the moving expense, would they?

A. I don't know what authority they had. They said they didn't have the authority.

The Court: When you say "they", who are you referring to?

Mr. Stephenson: Mr. McMahan and Mr. Fink.

Q. To sum it up, you turned in your expense for trips, from February 11th to September 1st, for a receipt, to Mr. McMahan and Mr. Fink.

A. Right.

Q. And you refused at their request to turn over your report on moving and other additional expenses, and supporting vouchers didn't you?

A. I don't know that I refused; I don't remember whether they even made a request for them.

Q. I think I asked you, didn't Mr. McMahan say, "Mr. Stephenson, give us those additional expenses you are going to claim, with the vouchers, so that we can get this matter of accounting straightened out"?

A. I think Mr. McMahan would remember what he said better than I do.

Q. Well, if Mr. McMahan says so on the stand,

(Testimony of A. W. Stephenson.)

that would probably be what actually transpired, wouldn't it? [162]      A. It might be.

Q. I show you Exhibit 6, Mr. Stephenson; that exhibit is dated September 11, 1951, isn't it?

A. That's right.

Q. And it is entitled Alaska Airlines, Inc., A. W. Stephenson, Analysis of Account?

A. That's right.

Q. Your Exhibit 6?      A. That's right.

Q. Now, that is the document that was given to you on September 19th, wasn't it, Mr. Stephenson?

A. That's right.

Q. And it purports to show dates, voucher numbers and the nature of any monies advanced, and the monies involved were either debited or credited to your account, were they not?

A. That's right.

Q. And it goes down through October 30 of 1950, November and December of 1950, January of 1951, February of 1951, March, April, June, July, August of 1951, does it not?      A. That's right.

Q. Now, I believe you admitted on direct examination that all those items were properly in a document such as Exhibit 6, with the exception of four items, didn't you, those items being under February 28, check 4511 for moving, check 45—

The Court: Is counsel reading numbers or amounts? [163]

Mr. Nesbett: I will read both, your Honor.

Q. Check 4511 entitled advance moving, in the

(Testimony of A. W. Stephenson.)

sum of \$700.00; did you not testify on direct that was not a proper part of this accounting?

A. Whether it was properly a part of this accounting, I don't remember just how it was put; I stated that that was not a part of a traveling expense account.

Q. Well, you did receive that check number in that amount, didn't you, Mr. Stephenson?

A. Yes.

Q. And purportedly for advance for moving and so forth—additional expenses?

A. That's right.

Q. And down under March 30, voucher 1-514, New York check for moving, \$1,500.00; you did receive that amount, didn't you?      A. Yes.

Q. Isn't there another moving check in here somewhere—

A. This shows July 31, voucher No. 6-478, check No. 4343, Expense advance, and in pencil, moving \$400.00.

Q. You did receive that amount, didn't you, Mr. Stephenson?      A. That's right.

Q. And then the last four items under August 28, 22, 15, and 23, are credit on payroll checks or an advance for preview flight are they not?

A. The one \$200.00 item, voucher dated August 28, 1951, [164] voucher No. 7-517, reads credit for No. 4562 charged in error.

Q. That cancels out the item just above it, on check 4562, doesn't it, \$200.00?

A. That's right.

(Testimony of A. W. Stephenson.)

Q. All right; and the preview flight, \$1,250.00; you did receive that sum, didn't you?

A. Yes.

Q. And did you testify that roughly \$300.00 of it had been expended on the flight and the balance of \$950.00, roughly, was deposited in your account?

A. Yes, as I remember it the check was deposited in my account; I so testified a while ago.

Q. I was just asking you if that wasn't the situation. Now, how can you account for the fact that your expenses on this flight were only \$300.00 or thereabouts, nevertheless you drew in advance \$1,250.00 from the company to carry the flight through?

A. The situation was this: that Alaska Airlines had no credit at any airport, any hotel—as a matter of fact, the hotels in Alaska required advance cash deposits on the rooms that were reserved. Every place that we went—in fact, if we had to buy gas anywhere we knew that we were going to have to have the money with us in cash—not even an Alaska Airlines check—to pay for it.

Q. Did you pay the room rent for all these people from Portland [165] and Seattle?

A. No.

Q. Did you calculate to do it?

A. I wanted to be prepared to do it.

Q. Where, for example, did you figure you might have to pay their room rent—in Anchorage?

A. Yes.

Q. Why?

(Testimony of A. W. Stephenson.)

A. Because it would be necessary to pay for the rooms and no one in Alaska had authority to write a check without Mr. Marshall's approval, or the Treasury Department's approval, except myself and Mrs. Brislawn on the special account in the Union Bank of Anchorage.

Q. Yes, I know; but did you pay any of the room rent of these people while, for example, they were in Anchorage?      A. No.

Q. Or they didn't stay overnight in Naknek or King Salmon?

A. They stayed over night in King Salmon.

Q. Did you pay their room rent there?

A. No.

Q. You bought their meals?

A. I bought all of their meals—\$217.00.

Q. And that was charged against your expense account, wasn't it, not this \$1,250.00?

A. What's that? [166]

Q. The meals that you paid for in King Salmon were charged on one of your expense accounts there rather than paid out of this \$1,250.00, weren't they?

A. Yes; it was filed in that voucher with them——

Q. Did you pay cash for those meals in King Salmon?

A. No; I wrote a check for it; my own personal check. I have it there.

Q. You had \$1,250.00 in cash on you, didn't you?



(Testimony of A. W. Stephenson.)

A. I did not; I deposited, as I stated before, that check in the Union Bank of Anchorage.

Q. I misunderstood you; I thought you expended \$300.00 and then put the balance in your account.

A. I don't think there was any room for misunderstanding. I stated I endorsed the check and it shows it was deposited in the Union Bank.

The Court: To what account?

Mr. Stephenson: My personal account. Mine and my wife's checking account.

Q. Then you put the \$1,250.00 in a joint account that you and your wife had in the Union Bank, is that correct?       A. That is correct.

Q. Now, to sum up Exhibit 6, the deposits show a total of \$10,075.21, do they not?

A. That's right.

Q. And the credits show a total of \$2,451.47, do they not? [167]

A. That's right.

Q. Now, Mr. Stephenson, assuming that the company had given you credit for these items marked Check from payroll in the sum of \$536.20, and Payroll on the last item, \$256.49, assuming that credit had been given you as Exhibit 6 sets out, then the situation as of September 11th was that you had received from Alaska Airlines the sum of \$10,075.21, wasn't it?

A. The situation was that I had received that amount of money, yes.

(Testimony of A. W. Stephenson.)

Q. And that you had been credited by Alaska Airlines with the sum of \$2,451.47?

A. That's right.

Q. Of course, that is prior to September 19th when you finally turned in this stack of expense reports, wasn't it?      A. That's right.

Q. But as of September 11th this Exhibit 6 that you have introduced was roughly the accounting situation, wasn't it?

A. It was roughly, is right, and of course to use this statement as a statement of traveling expense, it was in error.

Q. Yes, but the final situation could not be determined until your expense reports submitted on September 19th were finally worked into the accounting could it?      A. That's right.

Q. Mr. Stephenson, I show you a letter; can you identify that letter? [168]

A. It's a copy of a letter.

Q. Is it a copy of a letter addressed to you?

A. Yes.

Q. Dated October 15, 1951?      A. Right

Q. Signed by Mr. R. W. Marshall?

A. Right.

Mr. Nesbett: We offer this in evidence, your Honor.

The Court: Did you receive the original?

Mr. Stephenson: I did, sir.

Mr. Hughes: Mr. Stephenson, did you say you received the original of this letter?

Mr. Stephenson: I did, yes.

(Testimony of A. W. Stephenson.)

Mr. Hughes: No objection.

The Court: Without objection it is admitted in evidence, marked Defendant's Exhibit C, and may be read to the jury.

The Clerk: It's a letter dated October 15, 1951; Defendant's Exhibit C.

Mr. Nesbett then read Defendant's Exhibit C to the jury.

Mr. Nesbett: Your Honor, that concludes all the cross-examination I have at this time. May I release the witness with the right to call him later with the right of further cross?

The Court: Yes; is there any redirect examination?

Mr. Hughes: Am I to understand counsel is just reserving the right at this time to further cross? [169]

Mr. Nesbett: I wonder, your Honor—this is what I meant—what I want to do is to touch on other subjects that were brought up on direct. May I have the privilege of calling Mr. Stephenson on cross at a later point?

The Court: You mean subjects that do not occur to you now? If counsel overlooks something he may call him later.

Mr. Nesbett: I am not certain what stand we want to take and we are waiting, as a matter of fact, on the full transcript, and I don't think it would prejudice the rights of the plaintiff if we called him later to touch on other subjects.

The Court: How long will it take counsel to get the transcript?

(Testimony of A. W. Stephenson.)

Mr. Nesbett: I am advised it can be produced over the week end. Of course, I suppose I could call the witness as my own and have the same rights as I would under cross.

The Court: I should imagine so.

Mr. Nesbett: But the subject was touched on in direct, and I'm not certain at this moment whether I want to pursue it myself, or not, at this time.

Mr. Hughes: If the Court please, and Mr. Nesbett, I am not myself satisfied with the position of counsel in this regard. If, as the Court indicated, it was something that was overlooked, but it apparently appears to be a question which Mr. Nesbett has considered and still is considering; he has knowledge of what he wants to inquire into but wants further study before he goes into the matter on cross-examination, and it appears to me [170] to be asking something of an advantage. While I am not inclined to want to deny Mr. Nesbett any rights to get at the trial of the matter, I think he should exercise that option the same as I would expect to do myself, and certainly he's had every opportunity to hear the testimony and consider it, and——

Mr. Nesbett: The only answer to that is that Mr. Hughes is not the defendant in this case and I don't think it would prejudice any of his rights, and conceivably it would prejudice our rights if I were forced to pursue the matter now, until I have had a chance to give mature consideration to the actual words.

(Testimony of A. W. Stephenson.)

The Court: How many witnesses will there be for the plaintiff?

Mr. Hughes: At this time I am not inclined to call any other witnesses. I am checking—I might want to call one more witness, but I am not positive, depending on the time element. This may be the last witness, your Honor.

Mr. Nesbett: My request won't delay the trial; I am prepared to go ahead with my witnesses.

The Court: I think if counsel wants to cross-examine he should proceed, but let Mr. Hughes ask whatever questions he wishes to on direct examination; that will give counsel further opportunity to reflect upon the subject, and then before the plaintiff's case closes, I think that counsel should proceed with cross-examination and if he does not care to cross-examine any more, then of course it does not preclude counsel from calling the [171] witness as a witness on behalf of the defendant.

Mr. Nesbett: That question came up once before and I believe your Honor has agreed that under the rule I have the privilege of examining him as on cross.

The Court: I think that under the rule—calling an adverse witness—I don't know which rule it is, but the general rule is that when opposing party is called as a witness, the opposing party has virtually all of the privileges of cross-examination; he may ask leading questions and so on.

Mr. Nesbett: And the privilege of impeachment, if the occasion arises.

(Testimony of A. W. Stephenson.)

The Court: I held in another case that the witness could not be impeached to the extent of showing he had been convicted of a crime, but I am sure that doesn't exist in this case. I say I am sure—I assume it does not.

Mr. Nesbett: Very well, your Honor.

The Court: Counsel for plaintiff may ask questions in redirect now and then at the conclusion of that, counsel for defendant may again cross-examine the witness if he desires to, even upon subjects of which he now knows, but concerning which at this time he does not wish to press. Counsel for plaintiff may re-examine.

Mr. Hughes: Am I presumptuous in assuming that exception is taken, your Honor?

The Court: Oh, sure; exceptions are taken, of course, as to all adverse rulings, but counsel may voice his exception if he [172] desires to; there is nothing to prevent that.

Mr. Hughes: May I ask the Court's indulgence, since it won't prejudice the defendant. May I ask for a ten minute recess before we take up—

The Court: All right; the Court will take a recess. Ladies and gentlemen of the jury, every time you separate I am obliged to remind you of your duty; I have heretofore given you admonitions upon the point.

(Whereupon the Court recessed from 10:52 o'clock, a.m., to 11:02 o'clock, a.m., at which time the following proceedings were had.)

(Testimony of A. W. Stephenson.)

The Court: Without objection the record will show all members of the jury present. Counsel for plaintiff may undertake redirect examination of the witness.

Mr. Hughes: I don't believe the Court has admonished us that witnesses that are expected to be called are supposed to remain out of the court room. I don't know whether——

The Court: All persons who are or may be witnesses in the case are required to remain outside of the court room until individually called as witnesses.

Mr. Nesbett: What is the situation in connection with something new that might arise in the course of the trial where a person not expecting to be called as a witness suddenly may become a relevant witness? Is it a rule that they are foreclosed from appearing? [173]

The Court: We expect the parties to use discretion. It might be in the trial of a criminal case that some actual spectator would suddenly find himself in the court room without knowledge of the rule, and would discover he knew something about the case, and in the interest of justice his testimony ought to be heard; in that case the Court would allow the testimony to go in. That is one reason we permit spectators in the court room, so that if any spectator finds he should give his testimony in the interest of justice, his testimony should be heard. But in ordinary civil cases, I can't conceive the parties wouldn't know in advance who their wit-

(Testimony of A. W. Stephenson.)

nesses would be. There may be such instances—one cannot think of every possible contingency; in that case, the witness could be heard.

Mr. Nesbett: I am thinking of an answer of Mr. Stephenson's while in response to a question I put to him. Nevertheless, say something relevant to the case makes a person who has been sitting as a spectator, puts that person in the position of being able to take the stand and testify, although she might have sat as a spectator during the course of the trial.

The Court: That should be avoided counsel, however that person might be permitted to testify at the discretion of the Court. I would want to know more about it before permitting that person to testify.

### Redirect Examination

By Mr. Hughes:

Q. Mr. Stephenson, in regards to the submission of vouchers to the company, was it your practice to keep duplicate records of all vouchers submitted?

A. Keep duplicates of the voucher, but it would be rather difficult, or impossible, to keep duplicates of all supporting papers such as hotel bills and airline tickets and things of that nature.

Q. Well, then, would you please explain your concern in regards to the release of vouchers which you admittedly held up, or you stated that you held up?

A. I believe I explained that on cross-examina-



(Testimony of A. W. Stephenson.)

tion, as the fact that I found that vouchers were not in the possession — or the supporting papers and expense vouchers were not in the possession of the Treasury Department at Everett when I asked about them?

Q. What was the explanation that was given you and who gave it?

A. The explanation was given by Mr. Baruth and possibly Mr. McMahon at different times, that Mr. Marshall had those in the New York office—in his office.

Q. Well, were you familiar with the accounting procedure of the Alaska Airlines?

A. Yes; to a certain extent.

Q. Well, was it the usual thing for vouchers to go back to Mr. Marshall for his approval?

A. Not on the vouchers; normally a list of vouchers, just a [175] tabulation of the vouchers on file, with the amounts of money involved, were usually sent to Mr. Marshall for approval for payment. It was simply a tabulation, giving the date and the party, or firm, involved, and the amount of money. In the case of employees' expense accounts that applied, too.

Q. Well, do you know whether monies covering approved vouchers were then forwarded with the approval?

A. No; Mr. Marshall would take the list of vouchers prepared in Accounts Payable, and direct the Treasury Department, by different symbols

(Testimony of A. W. Stephenson.)

and indications, as to when to pay the various vouchers.

Q. Now, in regard to Mr. Baruth, what, if any, authority did you have over him?

A. I had none. The way the Alaska Airlines organization was set up, the Treasury Department was directly under the control of Mr. Marshall and he authorized all expenditures, the payment of expenditures, by approving the items on the lists of vouchers that were submitted by Mr. Baruth or Mr. Mehl.

Q. Well, did you ever give orders to Mr. Baruth in your official capacity?

A. No. Any statement or anything that I made to him was a recommendation that he pay certain items, or press Mr. Marshall to approve payment of items.

Q. Well, did you regularly have conferences with Mr. Baruth?

A. No; not very often. [176]

Q. Well, did you ever have conference with him in regard to the policy of the company?

A. Yes; they weren't in the manner of conferences particularly—as to whether we could decide anything—it was a matter of discussion as to what action or what we could do to prevail upon Mr. Marshall to pay accounts.

Q. I would like to have you refer to Exhibit No. 5, Plaintiff's Exhibit 5, and will you please state what the scope of your duties were, keeping in mind that instruction?

A. My duties were to conduct the operation and

(Testimony of A. W. Stephenson.)

manage it— do what was possible to increase traffic, effect any economies, meet and negotiate and conclude contracts and agreements of various kinds in both Alaska and Seattle and Paine Field.

Q. Was the Accounting Office a separate division, or was it under your control then?

A. It was a separate function.

Q. Now, Mr. Stephenson, in regards to Exhibit No. 6, which is an analysis of accounts, September 11, 1951, Mr. Nesbett raised the question of why you brought this suit at the time you did. Now, did you at any time prior to September 11th, have a conversation with Mr. Marshall agreeing that you would have an accounting here in Anchorage?

A. We didn't agree to an accounting here in Anchorage. We agreed that we would get together and have an accounting, that I would submit vouchers and support, and the Treasury Department would [177] provide a correct and up to date statement of debits and credits and that we would sit down and go over that and agree upon a final settlement of the accounts.

Q. When you say "we," who was we?

A. Myself and Alaska Airlines, presumably Mr. Marshall.

Q. Well, now, when was that statement made, that you would have such an accounting?

A. About the 8th of August.

Q. Did you at that time advise Mr. Marshall that you had supporting vouchers ready for such a meeting?

A. I did.

(Testimony of A. W. Stephenson.)

Q. What was the next action that Mr. Marshall took towards setting this meeting?

A. He never did set the meeting. During the last week in August he promised that he would have the Treasury Department get their accounting up to date and give me a statement. I volunteered to go to Seattle and do it there. I was advised, "No; we'll have that statement brought up here." While this statement is dated September 11th, it was not submitted to me until September 19th.

Q. Well, who advised you of this meeting between Mr. McMahan, Mr. Fink—who arranged for the meeting between Mr. McMahan, Mr. Fink and yourself on September 19th, 1951?

A. I had been waiting for someone from the Treasury Department to arrive and I met Mr. Fink in the city ticket office and he [178] advised me that he had my statement and that arrangements had been made for a meeting at 1:00 in the afternoon on the 19th in Mr. McCutcheon's office.

Q. Was it your expectation to complete your accounting at that time?           A. It was.

Q. What was the next communication that you received, or information that you received from Alaska Airlines, following your meeting of September 19th?

A. It was a letter from Mr. Marshall dated September 20th through the Anchorage mail; I think I got it on the 22nd or 23rd.

Q. I ask you if you recognize this document?

(Testimony of A. W. Stephenson.)

A. I do.

Q. And do you recognize the signature thereon?

A. I do.

Q. And whose is it?           A. R. W. Marshall.

Q. Is this the communication that you refer to that you received after the 19th?

A. That's right.

Q. Of September, 1951?           A. Right.

Mr. Hughes: I would like to offer that.

Mr. Nesbett: We have no objection.

The Court: It may be admitted, marked Plaintiff's Exhibit 16, [179] and may be read to the jury.

The Clerk: It's a letter dated September 20th.

Mr. Hughes: I would like to read at least the text of it, or part of it, and later it may be referred to.

Mr. Nesbett: I think, your Honor, that the letter should be read in its entirety.

The Court: It may be read.

Mr. Hughes then read Plaintiff's Exhibit 16 to the jury.

Q. Now, then, Mr. Stephenson, did you make a reply to this communication?

A. I did not.

Q. Well, what action did you take following the receipt of this on the 20th—

A. I instructed the firm of Davis and Renfrew to file suit against Alaska Airlines for the money due me.

Q. Well, did the request—was this request in

(Testimony of A. W. Stephenson.)

line with the proof that you had submitted in regard to these vouchers?

A. Yes; the request to file suit was in line with the vouchers that I had submitted.

Q. Why did you feel you had to file suit?

A. Because of the items that Mr. Marshall had taken exception to in my expense accounts—that he had stated there were items in my account that were not in my account at all—for instance charges for meals—he had not considered that I had from time to time bought meals for company employees, Government officials [180] and airlines officials, and the matter of entertainment of people, it was proper for Alaska Airlines to buy their meals.

Q. Well, did these vouchers cover any particularly crucial period for Alaska Airlines?

A. Yes; it covered the time when we were trying to get a certificate, trying to get approval from the Civil Aeronautics Administration for our operation, when we were conducting a proving run in which we were required to perform for the Civil Aeronautics Administration as we would on a schedule. The items for meals on the 8th and 9th of August, for instance, were for the entire group that arrived on the proving run in Seattle; mechanical delays required that they be kept over an entire day and if we operated as normally as an airline, any delayed flight, it is normal for the airline to stand the meals or a certain portion of the expenses of people aboard the aircraft when it was our fault.

(Testimony of A. W. Stephenson.)

Q. Was Mr. Marshall aware, if you know, of the circumstances during this period?

A. He was very much aware of the circumstances.

Q. Were you expending greater amounts for the company at that time than you would in the ordinary course of business?

A. Yes, except in the industry, as in any business, it is only natural for the officials of the company from time to time—or customary, at least, for the officials of the company to buy dinner for prospective customers. If you require an [181] employee to stay at a meeting or something until 8:00 or 9:00 or 10:00 at night, after his family has had dinner at home, it is only fair for the company to buy his meal.

Q. Well, did all of those things exist during this time, or those circumstances?

A. That's right.

Q. Now, Mr. Stephenson, are you aware of the scrutiny—from your past experience, now—of the scrutiny that is ordinarily given to the expense account of a person in your position?

A. Well, yes, and normally in a situation of this kind it is expected of the officials of a corporation, or airline, or any other business, to be permitted and required and expected to make expenditures of that kind.

Q. Calling your attention to paragraph 4 of Exhibit 16, what was your action or your—did you take any particular action in regard to this state-

(Testimony of A. W. Stephenson.)

ment, "The arrangement that I made with you when you first became associated with the Company provided for a salary of \$1,000 per month plus \$300 per month to cover your added cost for living expenses prior to the time you moved your family to Anchorage. Our Accounting Department advises me that you later instructed them to change your salary check from \$1,000 per month to \$1,300 per month. You did this without my knowledge or consent." Did that cause you to take any action?

A. That completely false statement of the situation caused me [182] to advise the attorneys—yourself—and sign the complaint for wages due me.

Q. Well, did you have a general impression as to the entire letter?

Mr. Nesbett: Object to that, your Honor.

The Court: Objection sustained.

Q. Now, Mr. Stephenson, in regard to Exhibit 6, Mr. Nesbett, I believe, went over with you the advances for moving, and pointed that out as voucher 12-524 in the amount of \$700.00, and voucher 1-514 in the amount of \$1,500.00, and voucher 6-478 in the amount of \$400.00 as evidenced by check No. 4343; is that correct? A. Yes.

Q. Those were the items you said were moving items? A. That's right.

Q. Now, then, Mr. Stephenson, do you know, in regard to those particular items, do you know what it would take to make this accounting correct in that respect?



(Testimony of A. W. Stephenson.)

A. Well, those items should be credited on this statement, because they had nothing to do with travelling expense reports or any other advances.

Q. Well, then, the total of those three figures in the amount of \$2,600.00 actually should not be shown as a debit unless they are also credited; is that correct?      A. That is correct. [183]

Q. Now, in regard to voucher No. 12—this is December 29th as shown on Exhibit 6—voucher No. 12-318—

The Court: What is the amount of it, counselor?

Mr. Hughes: In the amount of \$219.36—

Q. You, as I recall it, made some mention of that in your direct; what was that item, if you recall.

A. It was an item that I had been charged with for which I had not submitted a voucher and to which I was entitled. We agreed upon that when Mr. Fink showed me that credit had been given, that my voucher had been changed by the Accounting Department; that that had been corrected.

Q. Well, then, that particular item—is that shown also as a credit on the same statement?

A. Yes; I was unable to find it until Mr. Fink showed me how the Accounting Department had handled the transaction.

Q. Do you recall how they handled it?

A. I believe it shows in the item, voucher No.—January 22, 1951, voucher 1-526, expense report \$591.13.

(Testimony of A. W. Stephenson.)

Q. Well, do you mean that that was increased there to cover this \$219——

A. My voucher was increased by the Accounting Department to cover that.

Q. I see. On the occasion of September 19, 1951, did I ask you, Mr. Stephenson, whether or not Mr. Fink or Mr. McMahan told you why determination of your account could not be made at [184] that time?

A. Yes; they said that Mr. Marshall would have to approve all vouchers.

Q. Prior to the letter of September 20, 1951, how long had it been since Mr. Marshall had discussed this matter of salary with you, as to the figure that you were to be receiving per month?

A. There was never any question, any further discussion, on the figure per month after September, 1950.

Q. Well, did he renew discussion of it, didn't you testify that he renewed discussion of that matter in January of 1951?

A. Not in the matter of changing the figure, the amount of money, no; he renewed the discussion of wanting to make it \$1,000.00 salary and \$300.00 expense allowances. He discussed that and agreed with me that since my reluctance to become involved in tax accounting, he agreed that it was all right. He did that again in March of 1951.

Q. Well, is it your statement now that other than the credits shown on Exhibit 6 as payroll

(Testimony of A. W. Stephenson.)

credits, that you had not received any salary from Alaska Airlines since the last of July, 1951?

A. No, not since the July checks, that is correct.

Q. Well, how do you account for the fact that it is shown on Exhibit 2 that you received salary for 9½ months, or a total of \$12,350.00?

A. That statement, W-2 Form, was prepared by the company. [185]

Q. Well, have you ever advised any officer of the company that those wages had in fact been paid, or given them any release of any kind?

A. No, I have not.

Q. There is one point, Mr. Stephenson; on Exhibit 15 that was admitted as illustrative of your testimony, I would like to call your attention to that. I would like to have you look at that statement again. I believe that on your direct you stated that that statement was exactly what you had testified to. Now, is there anything on there as you see it now that you had not testified to on your direct—calling your attention particularly to invoice 8/31/51 in the amount of \$47.73, and Telephone June, \$27.00; now, did you testify in regard to that, sir? A. I believe I did.

The Court: What is the \$47.73 for?

Q. Will you tell us what it is?

A. That was the invoice to me for the ticket for Mr. Curry from—

Q. You testified on that one?

A. I did, yes.

Q. How about the \$27.00 one; did you testify in regard to that? A. No, I did not.

(Testimony of A. W. Stephenson.)

Q. Well that item also appears in Exhibit 16 does it not, Mr. Stephenson—in Mr. Marshall's letter to you—is that item in any way connected with the item shown June 17, 1951, Electric [186] light for house, \$42.75—are those two items in any way connected?

A. In that, as you know, situated as we are in Anchorage, business hours in the States, and particularly on the East coast, several hours difference, and quite often telephone calls are made or received at your home rather than the office; this was particularly true when we were operating at Elmendorf, because quite often the phone was out of order. The billing comes from the City of Anchorage with an itemization of the long distance and the utilities charges, the electric current and the water, garbage—they're all on one bill and I believe that voucher listed with my other vouchers submitted on September 19th makes a charge of \$47.50, which was the total bill. The normal utilities bill from other months was about \$27.00 and you can only tell what the telephone charges were from that bill, possibly not that—I'm not sure whether it even shows the breakdown of long distance and other calls.

Q. Well, did you submit the entire \$42.00 as a voucher that you should get reimbursement for?

A. Yes, I submitted the \$42.50, and there is a possibility that only about \$27.00 of it should be credited.

Q. Was that indicated in your vouchers?

(Testimony of A. W. Stephenson.)

A. No, it was not indicated—the entire amount was taken by mistake and the proper amount should be in the neighborhood of \$27.00 instead of [187] \$42.50.

Q. Well, in computing the amount that you have coming from the company, as you set forth in your complaint, did you allow for that adjustment, or did you not?

A. No, I didn't; it should be credited.

The Court: I think we will suspend now; ladies and gentlemen the trial will be continued until 2:00 o'clock, and in the meantime you will remember the admonitions of the Court as to your duty.

(Whereupon, at 12:01 o'clock, p.m., the trial of the above-entitled cause was continued until 2:00 o'clock, p.m.)

(Be It Further Remembered, That at 2:15 o'clock, p.m., on 14th day of March, 1952, the trial by jury of the above-entitled cause was continued; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, the Honorable Anthony J. Dimond, District Judge, presiding; And Thereupon, the following proceedings were had.)

The Court: The witness Mr. Stephenson may resume the stand and counsel for plaintiff may proceed with examination.

Q. (By Mr. Hughes): Mr. Stephenson, you will recall on cross, Mr. Nesbett questioned you as to

(Testimony of A. W. Stephenson.)

why you brought this action on the 26th day of September; was there anything that moved you to bring this action that you have not already recited?

A. That's right; Mr. Marshall's letter dated September 20th. [188]

Q. I will ask you to refer to that letter, Exhibit 16; now, will you refer to Exhibit 16 and if that refreshes your memory, tell us why you were moved to bring this action at the time you did?

A. Because of statements in this the first paragraph; it states "after paying your August salary," which had not been done. The statement concerning the \$1,000.00 per month plus \$300.00 per month to cover expenses was entirely new to me, so far as it being in effect in any way, and in the tabulation of items he stated "there appears to be not the slightest support and obviously they deserve a more careful check," and goes on with the list of items. One of the first ones that concerned me was dated the 28th of March, 25% of \$86.25, \$23.06—in effect giving me credit for \$23.06 rather than \$86.25. This particular item was for a 25% discount on a Northwest Airlines first class ticket from Anchorage to Seattle, and that \$86.25 is exactly what the ticket cost and what I paid for it. Also on that same date I prevailed upon Northwest to do the same thing for Mr. Nesbett. On April 17th, Northwest Airlines 2nd fare, \$172.50; I never submitted any such item. It was never in my expenses account. All of the items for telephone were substantiated either by receipts or from hotel bills. For that reason, his

(Testimony of A. W. Stephenson.)

claiming such an amount of money there that wasn't supported, I felt there was no reason for further discussion. The tone of his letter indicated he didn't propose [189] to pay my expense accounts, and said that he was going to refer it to counsel, and I felt I had the same right.

Q. In regards to tickets on other airlines, was there any reason for one airlines executive to get a differential price on a ticket of another airline?

A. The tariff of the airlines filed with the CAB, along with other transportation regulations, set up certain procedures to follow, certain officials who may authorize free transportation, and certain officials who may request free transportation from other airlines. At that time Alaska Airlines did not have such a tariff and such regulations properly on file with the CAB; however, on occasions Northwest Airlines would give the 25% reduction, or give free transportation.

Q. Well, did you, during your employment, avail yourself of any benefits in this way that you could?

A. Yes. As I say, only certain officials designated by the companies, and with their names on file in the tariff regulations with the CAB, had authority to authorize free transportation or 25% reduced transportation, and Northwest's nearest officer with that authority was in Minneapolis and if I had time to make the written request or have a teletype request come through, and the individual contacted, it was possible to get free transportation or a 25% reduction on the first class fare. That

(Testimony of A. W. Stephenson.)

applied only to the first class, or the Stratocruiser flights so far as the 25% reduction is [190] concerned.

Q. Well, then, in securing this transportation, Mr. Stephenson, did that require some negotiations?

A. It required some time. It is very difficult to get it over a week end, particularly, or at night.

Q. Would that type of transportation entitle you to go ahead of a pay passenger?

A. It depended on the inclination of the airline official granting the transportation; he could designate any type—25% reduction, a non-revenue main route ticket, which was as good as a ticket, or a non-revenue space available ticket, which gave the pay passenger already listed first preference.

Q. Well, at the time mentioned there, did you have an opportunity to negotiate for one of these free tariff tickets?

A. As I remember I asked for a free transportation ticket and they came back with a 25% reduction. I'm not sure—there had to be a request. Normally you would request free transportation, although in a matter of courtesy from one airline to another, if you know that the other airline—the airline from which you are requesting transportation—has full loads and so forth, it becomes a matter of them losing so much revenue in order to accommodate you either on free transportation or 25% reduction, rather than your own company paying your transportation.

Q. Now, then, Mr. Stephenson, in regard to your



(Testimony of A. W. Stephenson.)

telephone bills how would you submit those in the normal course of affairs—how [191] were they shown in your vouchers?

A. They are taken off of either the charges of the telephone bill—the home phone bill—or the hotel bills—the local and long distance calls as listed on the hotel bills.

Q. Did company policy require that you designate who the call was to, if you know?

A. No.

Q. Well, other than the item that you have mentioned in Exhibit 16, which refers to electric light for house in the amount of \$42.75, dated June 17th, now, other than that item, are there any items mentioned there that were not supported by vouchers, if you know?

A. All the items for meals were not supported by vouchers.

Q. What was ordinary proof of expenditures for meals, if you know?

A. There was no receipts required.

Q. Well, did you just submit—

A. I made a daily report of—I kept a daily record of breakfast, lunch and dinner, and filed them and itemized them that way.

Q. Well, did you retain records of that, sir?

A. Yes, I retained my own copies; I normally would use a blank expense voucher for that purpose.

Q. Do you have all that supporting evidence for the entire period?           A. I do.

(Testimony of A. W. Stephenson.)

Q. Is that in form to be presented at this time?

A. It is already in the vouchers that I submitted to the company [192] in their proposed exhibit, with the exception that that form of a voucher does not provide for showing breakfast, lunch and dinner; it simply provides for the total of meals for the day, as I remember it.

Q. Well, then, you did give the normal supporting proof?

A. All that was possible to do on that voucher.

Q. Was that voucher furnished by the company?

A. Yes.

Q. And how long had it been in use, if you know?

A. There was about three or four different types of vouchers and forms, and it had been in use for some time, or before I came with the company, I believe.

Q. Now, Mr. Stephenson, in regard to your expenses for moving, was there any agreement between you and Mr. Marshall as to the type of voucher or proof that should be submitted in regard to that?      A. No.

Q. Well, did Mr. Marshall make any request for any support on that?

A. No, he never has.

Q. Do you know of any other employee who had this type of expense item?

A. Yes; the normal procedure, or company policy, for a move of any kind provides for moving

(Testimony of A. W. Stephenson.)

expenses. A new employee coming—I discussed with Mr. Bachman when he came with the [193] company, that he should be——

Mr Nesbett: I object to the introduction of that discussion as being hearsay.

The Court: You can tell whether the company paid his moving expenses, but not your conversation with Mr. Bachman.

A. I don't know whether he was paid or not.

Q. Did Mr. Bachman furnish you any vouchers of expense incurred during the moving?

Mr. Nesbett: Object again, your Honor; it is immaterial whether he did or not.

The Court: It may be material; overruled.

A. No, because his move was not completed while I was in Seattle.

Mr. Hughes: I think that's all.

The Court: Is there any further cross-examination?

Mr. Nesbett: Yes, your Honor.

### Recross-Examination

By Mr. Nesbett:

Q. Mr. Stephenson, in connection with this letter of September 20th, you gave, I believe, three reasons why you sued after you received that letter. Now, first, doesn't the wording of the next to the last paragraph seem like a reasonable request to you, Mr. Stephenson, or didn't it at that time, which is as follows: "We would

(Testimony of A. W. Stephenson.)

appreciate your furnishing us with the customary support or a complete explanation or in the alternative a repayment by you to the company"—that is the [194] list of meals and other expenses. Doesn't that seem like a reasonable request from Mr. Marshall?

A. Not when he already had the support with the vouchers.

Q. Well, Mr. Stephenson, is it your contention that the vouchers that you submitted one day prior to this letter—the expense reports were all supported by vouchers?

A. All the necessary vouchers, yes.

Q. Well, then, for example, don't you think Mr. Marshall was completely justified in, for example, asking you to explain some of these items, like on August 8th \$77.00 for meals—he should have some explanation, shouldn't he?

A. I don't think he needed any explanation on that item, he knew what was going on; he knew that I had the CAA proving run group to provide for all the way—free transportation and meals.

Q. Well, do you mean the CAA people who were checking pilots' procedure?

A. They were not checking pilots' procedure; they were checking Alaska Airlines.

Q. All right; they were on board the plane and making flights, weren't they, for a reason?

A. That's right; to be treated the same as pay passengers on a regular flight.

Q. Well, did you have to buy their meals?

(Testimony of A. W. Stephenson.)

A. There was no money available—the reason for buying them was [195] because we were supposed—we were to be conducting an operation as we would conduct it, and when a flight was delayed, such as this was interrupted, it is common practice and normal procedure for the airline to provide the meals.

Q. Didn't those CAA officials get per diem when they were travelling for the Government?

A. Yes, they did.

Q. Well, for example, again, such items as, well, back in June, June 5, \$18.65 for meals, June 6, \$17.94, June 7, \$24.25, June 8, meals, \$26.80; don't you feel, as an official of the company that someone was entitled to just what he asked for when he said politely, "We will appreciate your furnishing us with the customary explanation"? That is not such a statement as would induce you to run down to the attorney and file a suit, is it?

A. I do not feel that an explanation would have done any good when, for instance, on April 17th, he charged me with \$172.50, a Northwest ticket, which never appeared on any voucher.

Q. Well, all right; that would be an error, wouldn't it, and he would naturally appreciate your straightening that up, wouldn't he, if that is the case?

A. I don't know whether it would be an error or intentional.

Q. Well, for example, here, for meals I notice on April 20 there was \$14.75, April 21, \$29.46, and

(Testimony of A. W. Stephenson.)

then March 14, \$12.78, the 17th, \$9.87, the 25th, \$27.30, 26th, \$68.45. [196]

A. When was this?

Q. March 14, 17, 25 and 26. You couldn't expect him just to pay those without some little notation, could you?

A. Yes, I think so; I can tell you who the meals were bought for by consulting my diary; I can explain any of them, because along with my expense account records and one thing and another I kept a record of where I was and things of that kind.

Q. Well, wouldn't it be customary to outline on a slip of some kind with your expense report, saying, "I entertained Mr. Jones on such and such a date," with a notation of the cost of the meal?

A. No; not necessarily.

Q. Well, how do you mean not necessarily?

A. Because—

Q. Mr. Marshall is not with you and he wouldn't know, for example, on the 26th of March, the people you might have entertained to the extent of \$68.45, would he?

A. No; I can tell you who they were if you like, by consulting my diary.

Q. I am interested in why you, upon receiving this letter, didn't respond by going in and telling Mr. Marshall—possibly all this could have been avoided.

A. By the time I received that letter, Mr. Marshall was in Seattle.

Q. Well, you should have attempted, shouldn't

(Testimony of A. W. Stephenson.)

you, to contact [197] some other official and straighten it out?

A. I had been contacting other officials and I had never been able to get any specification, or any commitment as to agreement on any amounts of any kind.

Q. Tell us whom you contacted?

A. Mr. McMahan and Mr. Fink.

Q. Mr. McMahan was just an attorney; he wouldn't have anything to do with this, would he?

A. He sat in when those were submitted.

Q. Didn't he ask you to submit all your vouchers at the same time?

A. What do you mean, all the vouchers?

Q. He just sat in with Mr. Fink, the Treasury man who would be concerned with this?

A. I submitted my expense vouchers and told Mr. McMahan as far as my moving expenses and those vouchers, Mr. Marshall would have to keep his word with me and sit down with me and go over them and agree with me before I surrendered the vouchers and support.

Q. That was on April 19th, is that correct?

A. No; September 19th.

Q. Pardon me—sure, September 19th; then on September 20th he asks you to sit down with him and go over it, doesn't he?

A. He asked me to send him any support for those that I might have, when there was none indicated to be necessary, and asked [198] me to support a voucher of \$172.50 that he claimed was on

(Testimony of A. W. Stephenson.)

a voucher and it wasn't true; it was not on a voucher.

Q. I'm sorry if that happened; we will straighten that out when Mr. Baruth takes the stand; it may be in error.

A. He also included March 28, 25% of \$86.25, which was already a 25% reduction.

Q. That could have been an error, too, which could have been straightened out under the wording of this paragraph which says, "or a complete explanation," couldn't it?

A. No; I don't think so.

Q. Well, you didn't try, though, did you?

A. No, I didn't try.

Q. On this trial run, do you call it—when you were—

A. Proving run.

Q. Proving run—a number of company employees were along on those trips, too, weren't they?

A. That's right.

Q. And they were paid their per diem, too, on those trips, weren't they?

A. That's right; I didn't buy any of their meals, however. If I did there was no charge to the company for it because they could put it on their own expense account. As a matter of fact, on the one item of the 9th, I paid actually almost \$60.00 for those meals and have a receipt for it, on that particular item.

Q. This item of \$219.36 mentioned on Exhibit 6, do you recall [199] discussing that in your testimony—that was a fare?

A. That's right.



(Testimony of A. W. Stephenson.)

Q. That was a mistake, wasn't it, when it was first marked as a debit against you?

A. No; when the Treasury Department explained their procedure, I found it was a matter of my not knowing their procedure in the matter.

Q. In other words, they had actually marked it as a debit against you and credited it to you in the item of \$591.13 on that Exhibit 6, hadn't they?

A. That's right.

Q. Are you certain that this item of \$172.00 might not be explained some other way, somehow?

A. I have never seen an explanation of that amount.

Q. Didn't Mr. Marshall ask you to come in and talk it over?

A. He wrote me this letter.

Q. Yes; now, you gave as another reason for filing suit the fact that he mentioned in this letter of September 20th the matter of \$1,000.00 per month salary plus \$300.00 expenses, and I believe you said, did you not, that it was news to you insofar as an accounting was involved?

A. That's right.

Q. Well, it wasn't actually a new matter to you, though, was it? It had come up before, hadn't it?

A. Yes, and it had been agreed that the salary was \$1,300 a [200] month; Mr. Marshall agreed, "That's it, and we won't talk about it any more."

Q. Didn't you testify that you had discussed with Mr. Baruth and Mr. McMahan about it in Paine Field in Seattle when they brought the matter up?

(Testimony of A. W. Stephenson.)

A. They brought the matter up wanting to know if I didn't want to do it that way.

Q. As a matter of fact, didn't they tell you that was Mr. Marshall's orders?

A. If such a conversation transpired, I advised them that my salary and my arrangements was a matter between me and Mr. Marshall.

Q. Well, did you mention the matter to Mr. Marshall after that?      A. No.

Q. Now, on this matter of reduction on a ticket for me; we rode down to Seattle together, didn't we, on the Stratocruiser?      A. That's right.

Q. I was going to San Francisco on business?

A. That's right.

Q. And we stayed together in the same room in Seattle?      A. Right.

Q. And I left the room the next morning, I guess, and didn't pay my half of the room rent, didn't I?      A. Right.

Q. And you got me a reduction to go down on the Stratocruiser? [201]      A. Right.

Q. And I paid my ticket, didn't I?

A. Right.

Q. We were good friends then, weren't we?

A. I hope we still are.

Q. We are. There is one other item on telephone bills, Mr. Stephenson, when a call on company business is directed to your home you don't have to have that made a collect call on your bill, do you?

A. If it is an incoming call I don't know.

(Testimony of A. W. Stephenson.)

Q. Ordinarily, if it originates outside, some company office, it would be either a collect call or paid off at the other end, wouldn't it—it would have to be one of the two, wouldn't it?      A. Yes.

Q. And if it originated, for example, during your business hours and was finally completed at your home, it could be charged to Alaska Airline's number, couldn't it?

A. That is true, but as I explained before, there were periods of weeks at Elmendorf Field that the phone service was disrupted, particularly the line to the main office, and it was practically impossible to get a call through, and I don't know what the procedure would be when a phone is out of service, of having a long distance operator charge the call to that phone.

Mr. Nesbett: I believe that's all, your [202] Honor.

\* \* \*

C. W. BARUTH

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

By Mr. Nesbett:

Q. Mr. Baruth, state your full name to the Court, please.      A. C. W. Baruth.

Q. And what is your profession, Mr. Baruth?

A. Accountant and auditor.

Q. By whom are you presently employed?

(Testimony of C. W. Baruth.)

A. Alaska Airlines, Inc.

Q. What is your official capacity with that company? [204]

A. Assistant Secretary and Assistant Treasurer.

Q. And how long have you been so associated with Alaska Airlines?

A. It will be two years next month.

Q. Do you know Mr. A. W. Stephenson sitting here in the court room?      A. I do.

Q. I will ask you whether or not you have ever had occasion to be concerned with expense reports submitted by Mr. Stephenson?      A. I have.

Q. I will ask you to look at those documents—this is Defendant's Exhibit A for Identification—and see if you can identify the cover sheet on each of the sections.

A. The cover sheet is a resume of the expense account as submitted by Mr. Stephenson.

Q. For what expense account in that particular instance?

A. It is for the period February 11, 1951, through February 17, 1951, covering a trip to Seattle and Anchorage.

Q. And what does that cover sheet purport to be?

A. It is a resume of the expense account as submitted by Mr. Stephenson.

Q. And did you prepare that resume?

A. I did.

Q. Based upon the expense report itself?

A. Yes, sir.

(Testimony of C. W. Baruth.)

Q. And supporting vouchers? [205]

A. Yes, sir.

Q. Now, will you look at the other reports and identify, if you can, the first page of each of the reports?

A. The second cover sheet is a resume of the expense report submitted by Mr. Stephenson, and covers the period March 11, 1951, through March 17, 1951; it covers a trip from Anchorage to Seattle to New York.

Q. Was that prepared by you?

A. Yes, sir.

Q. Please turn to the next one; can you make the same identification concerning that sheet?

A. Yes, sir.

Q. Please turn to each one of them in turn and say whether or not you prepared that sheet and whether you recognize it?

A. All these cover sheets have been prepared by me based on the expense accounts submitted by Mr. Stephenson.

Mr. Nesbett: Your Honor, with that identification, I offer Exhibit A for Identification, into evidence.

The Court: It may be shown to counsel for plaintiff.

Mr. Nesbett: Maybe we could have a recess, your Honor, and save a little time; would it take time to examine those, counsel?

Mr. Hughes: It very likely will.

(Testimony of C. W. Baruth.)

The Court: We will recess until called, and counsel may notify when he is ready to proceed. [206]

(Whereupon, the Court recessed from 3:00 o'clock p.m., until 3:23 o'clock p.m., at which time the following proceedings were had.)

The Court: Without objection the record will show all members of the jury present. Is there objection to the admission of the proffered exhibits?

Mr. Hughes: I think that Mr. Nesbett, your Honor, wants to qualify those in some respects and then I will state my objection, if any.

The Court: Very well.

Q. (By Mr. Nesbett): I hand you Defendant's Exhibit A for Identification again, Mr. Baruth, and ask you to identify, if you can, the yellow sheet on the back, and the letter there?

A. The yellow sheet on the back is the audit sheet under which we checked out the dates.

Q. Well, is that your work sheet?

A. Yes, sir, it is.

Q. You prepared it before you prepared the recap on the front page, is that right?

A. Yes, sir.

The Court: What about the letter?

Q. How about the letter?

A. That is a copy of a letter written by Mr. Marshall to LaBrie's Restaurant in [207] Anchorage.

Mr. Nesbett: I'll yank that letter, then. That's all on that one.

(Testimony of C. W. Baruth.)

Q. Now, on the report covering the period March 11 through March 17, can you identify that white sheet?

A. Yes, sir; that is a data sheet checking out disbursements as reported by Mr. Stephenson.

Q. That was prepared by you? A. yes, sir.

Q. Your work sheet, in other words, in connection with the particular report? A. Yes, sir.

Q. The period covering March 24 through March 30 contains nothing other than what has already been identified. March 31 through 6, is that yellow sheet your work sheet?

A. Yes, sir, it is.

Q. Prepared by you in connection with the report? A. Yes, sir.

Q. And in connection with the report covering April 7 through April 13, is that sheet your work sheet? A. Yes, sir.

Q. And for the report covering April 14 through April 20, is that yellow sheet your work sheet?

A. It is.

Q. And for the report covering the period April 21 through April 27, aside from the voucher stubs, is that yellow sheet your [208] work sheet?

A. Yes, sir, it is.

Q. And for the report April 28 through May 4, can you identify that sheet

A. I prepared that sheet.

Q. That is your work sheet, is it?

A. Yes, sir.

Q. And May 13 through May 19, what is that sheet?

(Testimony of C. W. Baruth.)

A. That is my audit sheet of the expense account.

Q. And for the period May 20 through May 26, can you identify that sheet?

A. Yes, sir; I prepared that.

Q. This is your work sheet, is it?

A. Yes, sir.

Q. For June 3 through June 9, can you identify that sheet?           A. I prepared that sheet.

Q. Your work sheet?           A. Yes, sir.

Q. For the period June 16 through June 23, what is that sheet?

A. That is my audit work sheet for that expense report.

Q. For the period June 24 through June 30; identify that sheet if you can?

A. That is also my work sheet.

Q. For the period July 1 through July 7, 1951, what is that sheet? [209]

A. Also my audit work sheet.

Q. For the period July 8 through July 14, what is that sheet?

A. That is my audit work sheet.

Q. For the period July 15 through July 21, can you identify that sheet?

A. That is the audit work sheet for that particular expense report.

Q. For the period July 22 through July 28, what is that sheet?

A. That is the audit work sheet covering that expense report.



(Testimony of C. W. Baruth.)

Q. For the period July 29 through August 4, can you identify that one?

A. That is the audit work sheet prepared by me.

Q. For the period August 5 through August 11, 1951, identify that if you can?

A. I prepared that work sheet.

Q. And for the report dated September 1, marked Final Report, identify that sheet.

A. That particular report, Mr. Nesbett, was analyzed by Mr. George Roberts, the General Auditor of the company, under my supervision and direction.

Q. Would it be in the nature of a work sheet or final audit?

A. Final audit of that expense report.

Q. Prepared by one of your employees?

A. By our general auditor; yes, sir.

The Court: This is the final—this covers the whole series, [210] does it?

Mr. Baruth: No, sir; Mr. Stephenson submitted vouchers and expense statements, and the items that were submitted covered a period of time as stated on the report, your Honor. It was not submitted to us until on or about September 19th. That covers just those papers, your Honor.

The Court: I am thinking of the time involved. Does this cover only a weekly period?

Mr. Baruth: No; it covers the time and the vouchers which are attached.

The Court: Very well.

(Testimony of C. W. Baruth.)

Mr. Nesbett: Do you wish to look at them again, Mr. Hughes?

Mr. Hughes: Mr. Baruth, is this sheet here that you have identified, somebody else's work?

Mr. Baruth: Yes, sir.

Mr. Hughes: What about this sheet here?

Mr. Baruth: That is my work.

Mr. Hughes: Have you gone over this yourself?

Mr. Baruth: Yes, I have.

Mr. Hughes: You approved the compilations and figures shown on here?

Mr. Baruth: Yes, sir.

Mr. Nesbett: That sheet was prepared at your direction, was it, by your office?

Mr. Baruth: Yes, sir. [211]

Mr. Hughes: In regards to the offer, your Honor, the plaintiff would like to reserve the right to modify anything that he can establish was not in his writing. There is a considerable amount of notations on there.

The Court: The plaintiff has the right to dispute every word of it. The fact that counsel does not object to their admission—does not lead to the conclusion that plaintiff admits the accuracy of all of these figures. Is there objection?

Mr. Hughes: No objection.

The Court: Without objection the papers are admitted in evidence collectively and marked Defendant's Exhibit A, and they may be read to the jury, also the reading may be considered as having been concluded, and either party may refer to the

(Testimony of C. W. Baruth.)

papers and read excerpts from them, or all of them, at any time during the trial.

Mr. Nesbett: I don't desire to read them, your Honor.

The Court: Very well.

The Clerk: 20 vouchers covering the period from February 11, 1951, to September 1, 1951, inclusive, Defendant's Exhibit A. That one dated September 1 is the final—the other one is August 11, 1951.

The Court: I think that would be perhaps correct, and then there is this additional one which is dated September 1, 1951 which refers to the vouchers included in that particular file.

The Clerk: Yes. [212]

The Court: Counsel may proceed.

Q. (By Mr. Nesbett): I hand you Exhibit A, Mr. Baruth, and ask you to take that report covering the period February 11 to some date in February, and attached papers, and hold up the report entitled Expense Report, and explain how that report is designed and how it is used in the Alaska Airlines organization?

A. This is the regular expense report form which the company gives to its travelers for the purpose of having them record their expenditures on the specific trip on which they are engaged. The top line is Expense Report of—the name of the traveler—for the period from, and through; Trip to, from; Purpose of Trip, and then departures, date and hour, return date and hour; then the columns head-

(Testimony of C. W. Baruth.)

ing across go from Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Sunday. To the left are the various types of expense accounts most likely to be incurred, air fare, railroad, pullman, automobile, miles, amount @ 6c per mile; taxi and carfare, telephone and telegraph, baggage, and other expenses, which are to be totalled, and per diem, hotel expenses, meal expenses, and then in the lower block, lower left hand corner of the expense report, traveler is to indicate the amount advanced to him, any additional advance obtained, total and the balance due the company, if any, or to the employee, if any, and instructions as to where to send the check for reimbursement. On the right [213] hand side of the lower portion is job number to be charged, account number, signature of the traveler making the report, and a space for audit, name of the party who audits the expense account, and approved by the department head, and approved by the Accounting Manager.

Q. Mr. Baruth, would you explain to the Court and the jury the policy of Alaska Airlines, or rather the requirement in connection with the submission of those reports?

A. Well, if a person is on infrequent travel status, that is making a trip which may end four days hence, and does not travel again for some time, he is required to make that expense report immediately upon returning to base, and clear his cash advance, or obtain his reimbursement.

Q. What do you mean clear his cash advance?

(Testimony of C. W. Baruth.)

A. In other words, render accounting to the Treasury Department of Alaska Airlines as to what he has done with the amount of money advanced to him at the beginning of the trip—submit the report and attach necessary vouchers, and if there is any funds due the company he is to make settlement thereof, or if there is any funds due him, they will reimburse him.

Q. That is in connection with infrequent travelers, didn't you say?           A. Yes, sir.

Q. Is there such a category as frequent travelers?

A. Yes, sir. [214]

Q. What is the policy in connection with those people?

A. Their expense accounts are supposed to be submitted weekly and at the end of each month a final accounting is to be made.

Q. Do you know what status Mr. Stephenson was in?           A. Frequent travelling.

Q. That is, his reports would be due how often?

A. Not less than once each month for the purpose of taking into operating costs the expenses incurred during that monthly period.

Q. What is the policy of Alaska Airlines, and what policy do you follow as Assistant Treasurer and Secretary, in requiring supporting vouchers for the expenses outlined on the report itself?

A. We require the passenger's coupon with respect to travel by air to substantiate a fare claim for reimbursement; railroad tickets and Pullman tickets are to be attached for railroad travel; for

(Testimony of C. W. Baruth.)

automobile travel it must be designated from what point to what point and how many miles at 6c per mile. Then taxi and carfare should be supplemented by detail, as from the airport to the hotel, or hotel to airport, explaining why taxicab travel was necessary. Telephone and telegram is to be substantiated by listing the party called, especially on long distance calls, who called, and where the party resides that was being called.

Q. How would that be shown if it were not on a hotel bill—by [215] a little notation on a paper?

A. It should be by a notation on a supplemental sheet; and on Other Expenses, the traveller is to indicate which individuals were entertained by him at dinner, also state the purpose of the entertainment.

Q. What two categories of employees are there in Alaska Airlines with respect to per diem or reimbursement for expenses?

A. Normally anyone outside of an executive status is relegated to the \$8.00 per day per diem. Travel in Alaska has been increased from \$8.00 to \$10.00 per diem, which includes hotel and meals, but officer status is on an actual expense account.

Q. Now, concerning meals, was there any restriction as to the amount that an officer could spend per day for meals?

A. There was no restriction, but just an element of common sense.

(Testimony of C. W. Baruth.)

Q. Wasn't there a restriction of \$10.00 a day for meals?           A. Yes, sir.

Q. Then, was there any restriction, even on an officer, as to the amount they could spend for meals?

A. The restriction was placed on their meals at \$10.00 per day.

Mr. Hughes: I would object to further testimony on the policy of the company unless it is established who makes the policy and how Mr. Baruth knows this policy. It seems like to me that the testimony thus far has not been qualified in that respect and accordingly is objectionable. It is self-serving.

Mr. Nesbett: Your Honor, I didn't object when Mr. Stephenson [216] discussed policy.

The Court: The objection is overruled. This witness testified he has been in the employ of the company, I think, for two years; he ought to know something about the policy; overruled. Of course, all of the details counsel for plaintiff desires can be brought out upon cross-examination.

Q. Mr. Baruth, then suppose an executive submitted an expense report outlining meals amounting to \$47.00 for, say, Thursday of the week you are looking at; what would be your action as Assistant Treasurer and Auditor of that report in connection with that item?

A. I would request additional information as to why such a large expenditure was made for meals.

Q. If no explanation were given, how much would you allow for that date?

A. \$10.00 for the individual traveller.

(Testimony of C. W. Baruth.)

Q. What would be required to be submitted in order to be allowed \$47.00?

A. Detailed explanation of why it was so high, or names of the individuals whom he entertained at meals, and reason for entertainment.

Q. If such a supporting statement were given, then would the expense be allowed?

A. Yes, sir.

Q. Now, I will ask you whether or not you ever received any [217] instructions from Mr. Stephenson in connection with your audit and approval of employees' expense reports?

A. One time Mr. Stephenson and I discussed getting proper support from some of the travellers.

Q. When was that?

A. That was in early October, 1950.

Q. And what was said in that connection?

A. I was instructed to refuse to pass for payment any expense accounts which were not properly supported.

Q. And who gave you that instruction?

A. Mr. Stephenson.

Q. Where?

A. Paine Field, Everett, Washington.

Q. Was he at that time Vice-President and General Manager?           A. He was.

Q. Did you follow those instructions?

A. We did the very best we could.

Q. Now I will ask you, did you yourself audit all those reports that Mr. Stephenson submitted, as you said, on September 19th?           A. I did.



(Testimony of C. W. Baruth.)

Q. I will ask you if you had occasion to request that Mr. Stephenson submit his reports prior to September 19th?

A. Yes; I talked to Mr. Stephenson on several occasions when I informed him his accounts receivable was going to run large and it was necessary to file expense reports so we could correct [218] his account and reduce the amount of indebtedness shown on the account.

Q. Do you recall when you made those requests?

A. Well, up until early January, 1951, Mr. Stephenson was almost current with his expense reports——

The Court: Up until what date?

Mr. Baruth: Early January, 1951.

Q. All right.

A. But then beginning with February 11, we have had no expense reports from Mr. Stephenson until they were submitted on September 19th.

Q. Well, when did you make your first request, if you recall, that he become current?

A. As I remember, it was in March, 1951, prior to his departure for New York.

Q. What did Mr. Stephenson say in response to your request?

A. He told me he was working on them.

Q. Do you recall when you next requested that he make himself current?

A. As I remember, it was in June—about July 1st, prior to our preview flight.

Q. What did he say on that occasion?

(Testimony of C. W. Baruth.)

A. He was still working on them.

Q. When did you next request that he complete them?

A. It was during the month of June, as I remember; I told him [219] Mr. Marshall was very interested to learn why his accounts receivable was so high—that he had not presented any expense reports to me or to Mr. Marshall for approval. He informed me he did not intend to give me any expense reports to be sent to Mr. Marshall for approval until such time as Mr. Marshall arrived at Paine Field and he would then submit those to Mr. Marshall in my presence and obtain Mr. Marshall's approval.

Q. Did you make any further requests after that?      A. No, sir.

Q. When did you first see these reports, if you recall?

A. The latter part of September, 1951.

Q. Do you know when they were submitted to Alaska Airlines?

A. They were submitted to one of our representatives on the 19th day of September, 1951.

Q. Do you know what that representative did when he received them?

A. He gave a receipt listing the expense report dates and the certain amounts.

Q. What did he then do—forward them to you?

A. He brought them down to Everett.

Q. Did you audit them?      A. I did.

Q. Now, Mr. Baruth, look at that first report

(Testimony of C. W. Baruth.)

covering the period February 11th through 17th; there are some red pencil [220] marks on that report, are there not?       A. Yes, sir.

Q. Who made those pencil notes?

A. I did.

Q. Will you explain why you made them?

A. Well, items that were shown on the vouchers attached, for example hotel bills, I made an audit and considered the hotel expenses as they were shown on the hotel bill and compared them with Mr. Stephenson's expense report, also his local long-distance telephone calls, to show the items which were supported and the items which were not supported.

Q. Which items were not supported, if any, on that report?

A. All long-distance telephone calls.

Q. In what amount?

A. There's one item here of \$16.47 on Saturday, February 17, 1951.

Q. Is there anything there to give you any information in connection with why that call was made?

A. No, sir; there is no information on the attached voucher.

Q. Was any portion of that account submitted by Mr. Stephenson disallowed?

A. I have another statement which sets forth—

Q. Just answer the question for the time being, Mr. Baruth, and I will show you that later.

A. I would say yes. [221]

(Testimony of C. W. Baruth.)

Q. The telephone?

A. Undoubtedly the telephone, but I do know we disallowed this \$200.00 for meals which were reported to have been expended on the 17th day of February, 1951.

Q. Were any supporting vouchers given in connection with the meals?           A. No, sir.

Q. Do you know where those meals were supposed to have been served?

A. According to the expense report it says Alaska Airlines dinner at LaBrie's.

Q. All right; turn to the next one, Mr. Baruth; did you audit that report in the same manner you said you followed ordinarily in auditing the other reports?

A. Yes, sir, I did; this is my audit work sheet.

Q. Will you state to the Court and jury what you disallowed, if anything, on that report—doesn't your recap sheet on front show it?

A. No, it doesn't; this recap sheet is the sheet that I prepared based on Mr. Stephenson's expense report and had nothing to do with the items disallowed.

Q. I see.

A. There was some variation as to the dates on which the expenditure was reported compared with the actual hotel bill.

Q. Answer this question, Mr. Baruth: Did you, after you had [222] audited all those reports, prepare a recap of each of the reports on one sheet?

A. Yes, sir; I did.

(Testimony of C. W. Baruth.)

Q. Is this that recap?

A. This is only a part of it. There is another sheet. This is the summary analysis of Mr. Stephenson's expense reports as submitted on September 19th for audit and approval, and covers the period December, 1950, through September 1, 1951.

Q. And did you prepare that recap?

A. I prepared the original work sheet from which this report was typed.

Q. What did you have as a basis for preparing this recap?

A. Mr. Stephenson's expense reports.

Q. The reports in Exhibit A? A. Yes, sir.

Q. Well, then, does this recap break down all the expense reports covering that period into individual items? A. Yes, sir.

Q. Then, one of these sheets will represent all the expense items listed in these reports; is that correct? A. Yes, sir.

Mr. Nesbett: Your Honor, I would like to offer that in evidence.

Mr. Hughes: May I inquire if counsel offers this as illustrative or for the purpose of assisting his witness to testify? [223]

Mr. Nesbett: I offer it for whatever worth it may have to the Court and jury in deciding the case, subject to any correction or error we might have made; this sheet will take the place of everything in those reports except the top sheets.

Mr. Hughes: We have no objection.

The Court: It may be admitted. The jury will

(Testimony of C. W. Baruth.)

note that this sheet contains what the defendant Alaska Airlines claims to be the facts with respect to the dispute between the plaintiff and the defendant on the second cause of action. It may be admitted in evidence and marked Defendant's Exhibit D.

The Clerk: A Summary Analysis.

The Court: It may be read to the jury, or may be referred to without reading at any time during the trial.

Mr. Nesbett: I will waive reading, your Honor.

The Court: Yes; it is just a mass of figures that only a genius could remember verbatim.

Mr. Hughes: We will waive, your Honor.

The Court: Does that cover a period of time greater than that covered by the various papers in Defendant's Exhibit A?

Mr. Baruth: No, your Honor; it covers all those.

The Court: The same period of time?

Mr. Baruth: Yes; this is proving it.

The Clerk: Also that final report is included; it is just a summary of Exhibit A.

The Court: Yes; it is a summary of [224] Exhibit A.

Q. (By Mr. Nesbett): Mr. Baruth, what do you mean by auditing expense reports?

A. Well, when you audit an expense report you take the amount which the traveler claims due him and you verify his expenditures by comparing them with hotel bills submitted, or—

Mr. Hughes: Excuse me; your Honor, I believe that we haven't got this established. This analysis

(Testimony of C. W. Baruth.)

sheet, it says, covers the period December, 1950, through September 1, 1951, and the first item that appears is February 11 to 17; if I am in error, I would just like to have that straightened out.

Mr. Nesbett: I will ask Mr. Baruth a question.

Q. Were there any reports submitted between December 30 and February 11th?

A. Expense reports submitted as late as January, 1951, were credited to Mr. Stephenson's account; therefore, they were of no consequence as related to this.

Q. Would that be the expense reports—

A. The item, Mr. Nesbett, which Mr. Hughes refers to is in the final expense reports, which goes back to December, 1950.

The Court: That's how you go back to December, 1950—because the individual reports start with February 11 to 17, and then they continue through until August 11, and the last item is a series, group, of papers dated September 1st—do you say that that goes back how far, now—to December, 1950?

Mr. Baruth: Yes, sir. [225]

The Court: And continues through until September 1, 1951?

Mr. Baruth: For example, on item 1 there is a receipt attached for December 1, 1950; it is for Anchorage Christmas party.

The Court: Is it clear, counselor?

Mr. Hughes: I was going to—

The Court: It is before the jury. The plaintiff

(Testimony of C. W. Baruth.)

does not admit the accuracy of any of these calculations or computations. Counsel may proceed.

Q. You were explaining what you meant by auditing the expense reports.

A. We will take the expense account and run an adding machine tape of the various items, do the various totals, and as shown on this sheet, Exhibit D, which is the summary analysis of Exhibit A, we list on there the period from February 11 to February 17, taking the amount as reported in the first column—in the second column the total is audited—and then analyze the expenses as to air fares, auto expense, taxis, telephone and telegraph, hotel, meals, and other.

The Court: This does not purport to show any errors which the company thinks were made by Mr. Stephenson in his report?

Mr. Baruth: In the total only, your Honor, where we compared each expense report.

The Court: All right; I understand it now. I hope all the members of the jury do. [226]

Mr. Baruth: March 11 to 17, Mr. Stephenson reported \$189.61 and the total agreed; March 24 to 30, Mr. Stephenson reported \$386.55 and the total agreed; March 31 to April—

Q. All those totals agreed with one exception, didn't they—about \$100.00 error in addition?

A. There's two exceptions here, but they are errors in addition.

Q. Made on whose part?



(Testimony of C. W. Baruth.)

A. On Mr. Stephenson's; for example, May 13 to 19, was a 10c differential.

Q. Well, now, after you had prepared that recap sheet and had audited the reports, I will ask you, did you prepare another recap analysis of these expense reports?      A. I did, yes, sir.

Q. Do you recognize that sheet?

A. I prepared the original work sheets from which this sheet was typed.

Q. What is it called?

A. Audit Aanalysis of A. W. Stephenson's Expense Reports for period December, 1950, through September 1, 1951, submitted on September 19, 1951, to Alaska Airlines' representative in Anchorage.

Q. Go ahead and explain what's shown on that sheet.

A. This sheet, the second sheet, which followed Exhibit D, begins the same as Exhibit D. We start out with the period February 11 to 17 and the expense report as submitted; the next column [227] is the audited amount, which follows the first two columns of Exhibit D; then we list air fare, auto expense, taxi, telephone and telegraph, hotel, hotel cash advanced, employees party on a schedule, meals in excess of \$10.00, total unsupported, personal expenses not allowed, total unallowed, and net expenses allowable.

Q. Does that sheet represent the result of your audit, and show those expenses that were disallowed Mr. Stephenson?      A. Yes, sir.

Q. As reported by Exhibit D?

(Testimony of C. W. Baruth.)

A. Exhibit D is merely a summary of all expense reports submitted by Mr. Stephenson, without any disqualification of any of the expense items.

Q. This sheet shows those items that you, as auditor, disallowed?      A. Yes, sir.

Mr. Nesbett: Your Honor, I offer that in evidence.

The Court: Is there objection?

Mr. Hughes: We will make no objection.

The Court: It may be admitted, marked Defendant's Exhibit E, and may be read to the jury or considered read and referred to at any time by either counsel.

Q. Then, this Exhibit E, Mr. Baruth, shows the total result of all your efforts in going through that stack of expense reports, lists each trip, the dates, the amount reported and the amount disallowed, does it not? [228]      A. Yes, sir.

Q. It totals the amount disallowed and the amount allowed?      A. Yes, sir.

Q. And makes an accounting as of that date between Alaska Airlines and Mr. Stephenson?

A. Yes, sir.

Q. Then, subject to any error that might have been made in your department, that sheet contains the whole summary and analysis of the expense reports of Mr. Stephenson from December 30th to the time he left the company, does it not?

A. Well, this September 1 voucher contains one item which went back to December, 1950, and in order to verify that expense report as covering that particular period, it might sound a little bit mis-

(Testimony of C. W. Baruth.)

leading, but the total expense reports actually begin with February 11th to September 17th, and on September 1 Mr. Stephenson submitted additional expense reports which contained one back to December 30, 1950; that is the seventeen dollars and some odd cents for employees' Christmas party.

Q. Except that one item, it shows what I have insisted that it shows, does it not?

A. Yes, sir.

Q. Now, did you testify that it was the company policy to issue advance monies to persons making trips?

A. Yes, sir.

Q. Now, take the second report; what is the date of it? [229]

A. March 11 to March 17.

Q. Now, referring to the work sheet on the expense reports for that date, can you state to the Court and jury whether or not Mr. Stephenson received any cash advances prior to making that trip?

A. Mr. Stephenson received a check drawn on the Union Bank of Anchorage, in the amount of \$600.00.

Q. Is that check attached to that report?

A. Yes, it is.

Q. Was that cash received by Mr. Stephenson prior to going on the trip?

A. The check is dated March 9th, made payable to the order of A. W. Stephenson, in the amount of \$600.00—

Mr. Hughes: I would object—is this witness competent to know whether or not Mr. Stephenson got that check—did he issue that check?

(Testimony of C. W. Baruth.)

Mr. Nesbett: Mr. Stephenson, when he testified, I believe, admitted that he signed the check, and it is endorsed with his name.

Mr. Hughes: I don't know what particular check that is, but some of them went to his account, but it's never been established yet.

The Court: Counsel may look at this one; I understood it was identified by Mr. Stephenson.

Mr. Nesbett: All we know is what the record will show; and [230] if he didn't get the money, maybe he can show it.

Mr. Hughes (Examining check): All right; you may proceed.

Q. Presumably, then, Mr. Stephenson received that money, did he not, Mr. Baruth?

A. I assume that he did.

Q. All right; on the recap sheet that you have on the front of that report, will you explain to the Court and the jury what you have done in connection with this particular trip, and what you have done in connection with all trips that followed in that stack of reports in connection with auditing his expense vouchers, cash advances?

A. On this particular expense report we charge Mr. Stephenson's account with \$600.00 by virtue of the fact that he was given this expense advance—this is using Mr. Stephenson's own figures—we credited his account with \$5.00 air fare, auto expense, \$1.80; taxi and carfare, \$16.35; telephone and telegraph—

(Testimony of C. W. Baruth.)

Q. Without going through the whole thing, how much did he turn in and how did you figure it?

A. According to Mr. Stephenson his expenses were \$189.61, which would leave a balance from this particular cash advance, of \$410.39.

Q. Then, as far as you knew, he got \$600.00, and turned in \$189.00, and should have had that money left over at the end of the trip? [231]

A. Correct.

Q. What did you do in connection with the next trip, in carrying on that analysis audit?

A. Audited each expense report for proper support.

Q. Just for the moment we will go through with this work sheet you have on top of each expense report; explain to the jury how you carried out those cash advances less the expense reports turned in.

A. In this instance we are giving Mr. Stephenson credit using his entire expense report without any disqualifications.

Q. There were, in your final analysis, disqualifications? A. There were.

Q. But for this purpose you allowed the expense report as turned in, is that right?

A. To determine the amount of cash return at the end of each trip we based it on Mr. Stephenson's reports; this would show he had that left over from this one \$600.00 check.

Q. Take the next trip and explain the figures,

(Testimony of C. W. Baruth.)

not in detail, but the amount received and the amount that should have been left over.

A. In the expense report for the period March 24 through March 30, 1951, I brought forward the \$410.39 from the previous report and added three additional advances which were given to Mr. Stephenson, one on March 22, \$150.00, on an Anchorage check—March 28, \$350.00 on an Anchorage check, and March 30th, [232] an Everett check for \$100.00.

Q. Are those checks attached to that report?

A. The two Anchorage checks for \$150.00 and \$350.00 are attached. We did send for the March 30th check from Everett, which was for \$100.00.

Q. Go ahead.

A. The cash balance forwarded from the previous report, plus the three advances of \$150.00, \$350.00 and \$100.00, total \$1,010.39. We credited Mr. Stephenson's expenses as reported in the amount of \$386.55, which leaves a balance of cash, \$623.84.

Q. In other words, accepting everything he's turned in as expense, and matching it against the cash advanced, he should have had how much left over?      A. \$623.84.

Q. Did you carry that over on your analysis of the next trip?

A. I carried it over to the next report. On the expense report for March 31 through April 6, 1951, I brought forward the \$623.84 balance cash from the previous report and added the total cash advance which Mr. Stephenson obtained from the Am-

(Testimony of C. W. Baruth.)

bassador Hotel in the amount of \$50.00, which shows that during that period, March 31 through April 6, Mr. Stephenson had cash available in the amount of \$673.84.

Q. After the trip was over?

A. No; during the trip; we credited expenses, air fare, auto, [233] taxi and carfare, telephone, hotel, and meals, totalling \$552.02, and I add back the cash advance which Mr. Stephenson received from the Ambassador Hotel in the amount of \$50.00, because that \$50.00 was not included in the expense report total. At the end of that trip there was a balance of \$71.82.

Q. Very well; did you carry that balance forward in analyzing the cash advanced for Mr. Stephenson's expenses on the next trip?

A. Yes, sir. For the period April 7 through April 13, 1951, we bring forward the cash balance from the previous report, of \$71.82, add an April 8 cash advance from the Ambassador Hotel in New York, \$50.00, and the Union Bank check from Anchorage in the amount of \$400.00, which shows the cash available during this trip, \$521.82, against which we credited expenses in the amount of \$244.87, and cash advance from the New York hotel of \$50.00, making a total of \$297.87 credit, which left a balance of \$226.95.

Q. That should have been in his possession at the end of that trip, is that right?      A. Yes.

Q. What is this trip?

A. April 14 through April 20. We bring forward

(Testimony of C. W. Baruth.)

\$226.95 from the previous report and add Union Bank check No. 4230 in the amount of \$300.00, and Everett check in the amount of \$100.00, both checks are attached, making a total cash available of [234] \$626.95. We credit expenses as reported in the amount of \$179.37, which leaves a cash balance of \$447.58 at the end of this trip.

Q. Very well; you carried that forward, did you, to the next trip?

A. Yes, sir. On the expense report for the period April 21 through April 27, there was a cash balance of \$447.58 from the previous trip, in addition to a Union Bank check issued on April 26 in the amount of \$200.00, which made a total cash available of \$647.58. We credited expenses of \$54.41, which left a cash balance at the end of the trip of \$593.17. That amount is carried forward to the April 28 through May 4 expense report, and we add cash advance from Hotel Gowman in the amount of \$20.00, making a total of \$613.17; we credited \$92.70 and we add back the cash advance of \$20.00, because the \$20.00 was not included as an item of expense in his report, which makes a total credit of \$112.70, and leaves a balance of cash on hand of \$500.47, which was carried forward to the expense report for the period May 13 through May 19, 1951; to this we add, on May 7th, a Union Bank check, No. 4549, which was issued to the National Bank of Alaska for a draft payable to the Ambassador Hotel in New York for an unpaid hotel bill, April 18th, in the amount of \$205.85; May 16 we add cash advance



(Testimony of C. W. Baruth.)

obtained from the Gowman Hotel, Seattle, \$20.00, which indicates that there were funds available to be accounted for in the amount of \$726.32. We credited expenses of \$112.69, [235] which shows a cash balance of \$593.63. That is carried forward to expense report for the period May 20 through May 26, 1951, to which we add three cash advances, on May 20, \$10.00; May 21, \$20.00; and on May 23, \$40.00, which shows a total cash available during this period of \$663.63. We credited expenses of \$215.96; we add back the cash advances from the hotel because they were not included as an expense report item, of \$70.00, making a total net expense credit of \$285.96, which leaves a cash balance of \$377.67. That was carried forward to the expense report for the period June 3 through June 9, 1951, to which we add a Union Bank Check, No. 4558, and the check is attached, advance from Anchorage, Alaska, \$500.00; on June 5, cash advance from the Stewart Hotel, \$40.00; June 9, cash advance from the Stewart Hotel, \$40.00, showing total cash available for the period, \$957.67. We credited expenses as reported, \$280.21; we add back the \$80.00 cash advances from the hotel, which were not included in the expense report, giving a net credit of expenses in the amount of \$360.21, leaving a cash balance at the end of the period June 9, of \$597.46.

The Court: Court will stand in recess for eight minutes.

(Whereupon the court recessed from 4:25 o'clock p.m. until 4:35 o'clock p.m. at which time the following proceedings were had):

(Testimony of C. W. Baruth.)

The Court: Without objection the record will show all members [236] of the jury present. Witness may proceed with his testimony.

Q. Do you recall where you were, Mr. Baruth?

A. Yes, sir.

Q. Will you proceed?

A. We completed the June 3 to June 9 expense report period, which showed a balance of \$597.46.

Q. That is the money that Mr. Stephenson should have had left over from cash advances up to that date?

A. Yes, sir. The next expense report period is from June 16 through June 23, 1951. We bring forward the balance from the previous report, \$597.46; we add five cash advances to Mr. Stephenson as follows: June 11, Union Bank check No. 4567, advance from Anchorage, \$50.00; June 15, Union Bank check No. 4573, advance from Anchorage, \$100.00; June 18, Everett check No. 12260—

Q. Just read the check and number and point out that the checks are attached, if they are—check and amount, I mean.

A. June 18, check attached, \$100.00; June 22, Everett check, \$200.00; June 22, Everett check, \$200.00; there are five checks attached. The total of that cash forwarded from the previous report, plus the five additional advances indicates a total of \$1,697.46 available cash during this period. We credited expenses as reported in the amount of \$237.64, and we add an additional credit due to an

(Testimony of C. W. Baruth.)

error in addition, of \$10.00, giving a total credit of expenses of \$247.64, which left a [237] cash balance on hand of \$1,449.82, which was brought forward to the next report period, being June 24 through June 30, 1951. On June 27, Mr. Stephenson was given Union Bank check in the amount of \$400.00, and on June 30, obtained a cash advance from the Stewart Hotel of \$40.00, making the total cash available during the period, \$1,889.92. We credit expenses as reported, \$430.81; we exclude the item of \$6.14 because it was reported twice, once as Telephone and Telegraph, and then included in his meal bill; this leaves a net expense of \$424.67, and we add back the cash advance obtained from the hotel because it was not reported as an expense item in his report, which makes a total net expense credit of \$464.67, leaving a cash balance in the amount of \$1,425.15, which we carried forward to the expense report period July 1 through July 7, 1951. On July 6, Mr. Stephenson obtained a cash advance from the Stewart Hotel of \$50.00, which indicates a total cash available during the period, of \$1,475.15. We credit expenses as reported of \$110.50 and we delete an item of telephone and telegraph of July 8, because it was included twice, \$10.48, making a net expense credit of \$100.02, plus the add-back of cash advance by the hotel, which is not included in the expense report, of \$50.00, making a total net expense credit of \$150.02, leaving a total balance in the amount of \$1,325.13. That amount is carried forward to the expense report period of July 8 through July [238] 14, 1951. On July 8, Mr. Stephenson obtained a \$40.00 cash

(Testimony of C. W. Baruth.)

advance from the Stewart Hotel, showing a total cash available for the period, of \$1,365.13; we credit expenses as reported, \$209.24, plus the cash advance from the hotel, which was not included in his expense report, of \$50.00, making a total expense credit of \$259.24, leaving a cash balance on hand of \$1,105.89. We carried that amount forward on the next expense report period, July 15 through July 21. On July 17 we add the cash advance from the Stewart Hotel of \$30.00, making a total cash available during the period, \$1,135.89. We credit expenses as reported, \$107.06, and we delete the telephone and telegraph item not supported, of 70c, making a net expense credit of \$106.36, and we add back the cash advance from the hotel because it is not included as an expense item on his expense report, making a total net expense credit of \$136.36, which leaves a cash balance of \$999.53. We bring forward \$999.53 on the expense report for the period July 22 through July 28, 1951. We add additional cash advances, the Union Bank check on July 23 of \$1,250.00, and July 28, cash advance from the Stewart Hotel, Seattle, \$50.00, showing a total cash available during the period, \$2,299.53. We credit expenses as reported in the amount of \$422.95; we subtract an error in addition, \$100.00, making a net actual expenses as reported, \$322.95, and we add back the cash advance from the Stewart Hotel because it was not included as an [239] expense item on Mr. Stephenson's report, which makes a net expense credit of \$372.95, which indicates that

(Testimony of C. W. Baruth.)

on July 28 there was a cash balance of \$1,926.58. We carry this amount forward to expense report period beginning July 29 and ending August 4, 1951. We credit expenses as reported of \$67.53, which leaves a cash balance of \$1,859.05. This balance is brought forward to the expense report period August 5 through August 11, 1951. In addition, we charge Mr. Stephenson with four cash advances from the Stewart Hotel, August 7, \$48.00; August 9, \$75.00; August 10, \$40.00, and August 11, \$10.00, showing that the total advances from the hotel, of \$173.00, added to the carried forward balance from the previous report, makes a total cash available during the period, \$2,032.05. We credit expenses as reported of \$384.70 and we add back cash advance which Mr. Stephenson received from the Stewart Hotel in the amount of \$173.00, making total expense credit of \$557.70, leaving balance cash on hand of \$1,474.35. This amount of \$1,474.35 was carried forward to the final expense report which was dated September 1, 1951, and attached to this expense report are some vouchers; for example, I have them itemized into this total as reported by Mr. Stephenson—

Q. That is the final expense report, isn't it?

A. Yes, sir.

Q. All right.

A. Item 1, December 24, 1950, toys for Anchorage Christmas party, [240] purchased in Everett, \$17.12. Item 2, January, 1951, telephone, No. 53926, which was Mr. Stephenson's personal home phone

(Testimony of C. W. Baruth.)

number in Redondo Beach, California, \$16.47. Item 3, April 3, 1951, telephone, \$5.63. Item 4, May, 1951, telephone, March and April toll charges of \$63.50. Item 5 is June, 1951, telephone, which actually turned out to be Anchorage utility charges of \$42.75. Item 6 on July, 1951, telephone, June toll charges of \$29.13. Item 7, February 22, 1951, tire chains for company car, \$10.89. Item 8, June 2, subscription to Nation's Business, \$18.00. Item 9—

Q. Was that subscription to Alaska Airlines?

A. No; to Mr. Stephenson.

Q. Very well; go ahead.

A. Item 9, September, 1951, telephone in Anchorage, covering July and August, 1951, toll charges, \$69.38. Total expenses as submitted by Mr. Stephenson were \$273.87, which were in error by \$100.00, which we subtracted, which leaves net expenses as reported of \$272.87. In auditing these vouchers which Mr. Stephenson attached to this particular report, we found that some of these items were company business and some items were strictly personal business, so we deleted items as follows: Item 1, \$17.12, company business. Item 2, January telephone, personal, \$16.47. Item 3, April, 1951, telephone, \$5.63, personal. Item 4, May, 1951, telephone, we allocated \$21.00 to company business and \$42.50 to personal. Item 5, June, 1951, [241] utilities at residence in Anchorage, strictly personal, \$42.75. Item 6, July, 1951, telephone, \$2.88 company, and personal \$26.25. Item No. 7, February, 1951, tire chains for company car was absorbed in com-

(Testimony of C. W. Baruth.)

pany business, \$10.89. Item No. 8 on June 2, 1951, subscription to Nation's Business was personal, \$18.00. Item 9, September, 1951, telephone charges—we allocated \$67.50 to company business and \$1.88 to personal.

Q. How about that Nation's Business; why did you call that personal?

A. It is a policy of Alaska Airlines, Inc., when purchasing subscriptions to periodicals and magazines, whether for executive consumption or for use on the aircrafts en route for passengers, they must be purchased through our Purchasing Department and on a purchase order.

Q. How was this purchased?                   A. Direct.

Q. Who was the subscriber?

A. Arthur W. Stephenson.

Q. What address was given on that?

A. The subscription reads, A. W. Stephenson, General Manager, Alaska Airlines, Box 2200, Anchorage, Alaska.

Q. Is Box 2200 Alaska's box?

A. It was at that time.

Q. Very well. [242]

A. On summarizing the allocations as to company expense and personal expense, we found that the expense report of \$272.87 consists of \$119.39 company expense and personal expense of \$153.48, which we deducted, making a net company expenses allowable of \$119.39, leaving a cash balance on hand of September 1, 1951, of \$1,354.95.

Q. What do you mean by cash on hand?

(Testimony of C. W. Baruth.)

A. That represents the difference between the amount of money which Mr. Stephenson was given and the amount of money which he, according to his own expense reports, admits having expended for the company, leaving a cash balance unaccounted for of \$1,354.95.

Q. Is that final tabulation on that last report marked September 1, marked "Final" in red pencil?

A. Yes, sir.

Q. So, so far as you know from your audit, no explanation has been given as to where that \$1,354.95 went?

A. That is correct.

Q. Unless Mr. Stephenson has it himself, or had it at that time, is that correct?

A. Correct.

Q. Now, how about these various items of hotel advances in these reports—can an employee get an advance from a hotel on the basis of Alaska Airlines?

A. I wouldn't say on that basis. [243]

Q. How did that happen, do you know?

A. I don't know.

Q. Have you ever seen it before in any reports submitted?

A. No, sir.

The Court: I think we will suspend, counsel, unless you would prefer to go on.

Mr. Nesbett: No, any time; I imagine it will take some time to conclude examination of this witness.

The Court: I think we may as well suspend. Ladies and gentlemen of the jury, the trial of this case will be continued until next Monday morning at 10:00. In the meantime you will remember the



(Testimony of C. W. Baruth.)

admonitions of the Court as to your duty not to discuss the case among yourselves or with others, or listen to anything about it, and, perhaps most difficult of all, not to form, and certainly not to express an opinion until it is finally given to you.

(Whereupon, at 4:55 o'clock p.m., March 15, 1952, the trial of the above-entitled cause was continued until 10:00 o'clock a.m., March 17, 1952.)

(Be It Further Remembered, That at 10:00 o'clock a.m., March 17, 1952, the trial by jury of the above-entitled cause was resumed; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, the Honorable Anthony J. Dimond, District Judge, presiding;

(And Thereupon, the following proceedings were had): [244]

The Court: The witness may resume the stand and counsel may proceed with examination.

Q. (By Mr. Nesbett): Mr. Baruth, I show you Defendant's Exhibit A again and ask you to look at the last, or final, expense report and the recap on the front part of it; I will ask you what the final figure is that you referred to as being unaccounted for when the expense advances to Mr. Stephenson were finally compared with the expense reports as submitted by Mr. Stephenson?

(Testimony of C. W. Baruth.)

A. The amount of cash balance not accounted for was \$1,354.95.

Q. Do you mean there is no vouchers, no explanation, as to what happened to that money?

A. That is correct.

Q. Now, when you commenced preparing those recaps of expense reports, which date did you start with?

A. The expense report for the period February 11 to February 17.

Q. And didn't you testify that you commenced January 1, 1950?

A. Well, we did, but there was no expense account for that—during that period. You see, the expense accounts up to and including the one for January were already approved and credited to Mr. Stephenson's account.

Q. Didn't you also testify that in the expense report dated September 1 there were ones that took you back to January, 1950?

A. One item went back to December, 1950. [245]

Q. Then, in effect, this recap which shows a shortage, or unexplained use, of \$1,354.95, runs roughly from January 1, 1951, to September 1, 1951?

A. Yes, sir.

Q. Now, do you know what the status of Mr. Stephenson's account with the company, in connection with advances, as compared with expense reports, was at the time you commenced the January 1st to September 1st audit?

A. It was a little in excess of \$1,300.00.

(Testimony of C. W. Baruth.)

Q. Do you recognize this sheet of paper?

A. Yes, sir.

Q. What is it?

A. It is a reconciliation of the total account of Mr. Stephenson, taking only his figures for the period ending September 1st, which showed \$1,354.95 balance, and I then picked up the items from October 27, 1950, to and including December 31, 1950, which shows a balance due Alaska Airlines of \$1,331.51.

Q. Did you prepare that statement?

A. I did.

Q. And what did you use as reference to arrive at those figures?

A. Beginning with the September 1st balance of \$1,354.95, then I added to that the charges which were made to Mr. Stephenson's account by reason of advances from the period October, 1950, through and including December 27, 1950, amounting to \$2,119.36, and we credited Mr. Stephenson's account with the amount of [246] expense reports he had submitted in the amount of \$787.85, leaving a balance as of December 31, of \$1,331.51 not accounted for.

Q. And do you have any supporting papers to support those figures—did you bring them with you?

A. I have some, yes, sir.

Mr. Nesbett: Your Honor, I would like to offer this in evidence.

The Court: It may be shown to counsel for plaintiff. Is there objection?

(Testimony of C. W. Baruth.)

Mr. Hughes: May I ask a question? Mr. Baruth, is this offer of evidence a predecessor of Exhibit D?

The Court: D is the summary of Exhibit A.

Mr. Baruth: No, it is not, Mr. Hughes.

The Court: As I understand it, the proffered exhibit deals with the period between October 27 and December 31, 1951, is that correct?

Mr. Baruth: Yes, your Honor.

The Court: And Exhibit D is a summary of Exhibit A, and Exhibit A appears to cover the period, containing one item in December, 1950, and then from February 1 to September 1, 1951, is that correct?

Mr. Baruth: Yes, your Honor.

The Court: Well, when counsel asks if this is a predecessor, I presume he means if this is a predecessor in time—— [247]

Mr. Baruth: In attempting to reconcile the figures submitted by Mr. Stephenson with the amount Alaska Airlines shows on its books at the end of, I think it was October 25th, after we had credited Mr. Stephenson's salary to his accounts receivable.

The Court: I don't understand what this proffered exhibit is at all; I thought it covered an entirely different period from that covered by Exhibit D.

Mr. Baruth: Exhibit A, your Honor, is the period from February 11 to September 1, 1951.

The Court: What does that proffered exhibit— does that go back to October 27th and continue through until September 1st, or October 27th of this year?

Mr. Baruth: No; it goes from October 27, 1950, (Testimony of C. W. Baruth.)

to December 31, 1950, and picks up from January 1, 1951, through September 1, 1951.

The Court: I see.

Mr. Baruth: It is merely a grouping together, your Honor, of the two periods.

The Court: I see. In other words, the results of Exhibit A, or analysis, are embraced in this preferred exhibit?

Mr. Baruth: Yes, your Honor.

The Court: From October 27, 1950, to September 21, 1951?

Mr. Baruth: Yes, your Honor.

The Court: Does that answer counsel's question?

Mr. Hughes: I want to ask if this memorandum is contained [248] in the other exhibits already in evidence?

Mr. Baruth: There's two periods there, Mr. Hughes. There is one from October 27, 1950, to December 31, 1950, and then beginning with, I think February is the first entry on there, to the end of the expense account for which we had documents in Everett; in other words, what I am attempting to do is reconcile those figures with the amount of Alaska Airlines' claim, \$2,900.00 and some odd dollars, using only Mr. Stephenson's figures in the credit of February 11 through September 1, 1951.

Mr. Hughes: Well, is it true, then, that the statement that the account was not clear as of February 11, 1950—is that what you—

Mr. Baruth: That is correct; there was a \$1,331.00 balance for which we did not have expense reports nor vouchers nor explanation.

(Testimony of C. W. Baruth.)

Mr. Nesbett: By balance, you mean balance due Alaska Airlines when the expense advances were compared with the expense reports, is that correct?

Mr. Baruth: Yes, sir.

Mr. Hughes: Does September 1 on this refer to September 1, 1951?

Mr. Baruth: Yes; \$1,354.95 balance; that is the September 1 balance—1951. Then I add to that the totals making up the balance as of December 31 plus the adjustments which we made picking up the one item in February which we didn't have [249] included in this total and the expense report which we credited—I think it was February, 1951.

Mr. Nesbett: Your Honor, I will show Mr. Hughes the final expense report; I think that will make it clear.

Mr. Hughes: If the exhibit purports to show the total of the expenses of October 27, 1950, through December 31 of 1950, well then what is the last item on the page which is dated in 1951?

Mr. Baruth: I start out with the balance, Mr. Hughes, of Exhibit A, \$1,354.95; that represented the balance due Alaska Airlines for the period February 11, 1951, to and including September 1, 1951. It did not include anything previously brought forth from prior period of October, 1950, to and including December 31, 1950, as a separate period.

Mr. Hughes: Well, is that your explanation for the 1951—the last item that shows, February 28, 1951?

Mr. Baruth: Is that the \$1,331.00 item?

Mr. Hughes: No; it's \$58.75. That was an expense voucher which Mr. Stephenson submitted (Testimony of C. W. Baruth.)

which didn't clear the books until February; that was included in the statement as of September 11th.

Mr. Hughes: Do you have an extra copy?

Mr. Nesbett: I will make one if it is admitted.

The Court: Is there objection?

Mr. Hughes: The statement doesn't appear clear to me; I don't think it is illustrative—it certainly is confusing; it appears to be a self-serving statement, and I object to it— [250]

The Court: The objection is overruled and the proffered exhibit may be admitted to illustrate the testimony of the witness, and for that purpose only. It may be marked Defendant's Exhibit F if that be the proper letter for it. Mr. Baruth, I am not entirely sure that I understand these papers yet. Is it your suggestion that, reaching back to October 27, 1950, that the plaintiff owes, on these various papers we have had here—accounts, expense accounts, so on—that on September 1, 1951, the plaintiff owed the company \$1,331.51?

Mr. Baruth: No, sir; that was the balance owing the company as of February—prior to Exhibit A, your Honor.

The Court: Then, is it your suggestion that the plaintiff owes the company the balance which you testified to as a result of analysis of Exhibit A, \$1,354.95, and also owes the company, according to your books and your view of it, \$1,331.51?

Mr. Baruth: That is correct, your Honor. What I was attempting to do on this last exhibit was to reconcile the company's statement as of October

(Testimony of C. W. Baruth.)

25, I think it was \$2,900.00, with the figures I had taken from Exhibit A, plus what our ledger account showed up to the end of December 31, 1951, of \$1,331.00, and crediting Mr. Stephenson's account with the February expense voucher of \$58.75, I believe, and charging him for the amount of cash balance on one of the early February, 1951, expense accounts.

The Court: If we add those two together, \$1,354.95, as shown [251] by Exhibit A, and \$1,331.51, as shown by this last paper in evidence, Exhibit F——

Mr. Baruth: This statement, your Honor, if I may so state, is drawn to have chronological order. I begin with the September 1, 1951, balance, and then I pick up the previous balance, and I show the totals of the previous balance—how it was arrived at.

Q. (By Mr. Nesbett): Now, Mr. Baruth, using that sheet to illustrate your testimony, will you explain—there are only seven or eight items—explain to the Court and jury how you arrived at that figure of \$1,331.51, and mention the amounts and the dates, and the vouchers?

A. On October 27, 1950, Mr. Stephenson was given a cash advance of \$100.00; on October 30th an expense report was credited to Mr. Stephenson's account in the amount of \$287.26; then on November 9, he received a check in the amount of \$700.00 as an advance; November 24, Mr. Stephenson received another check for \$200.00; on November 30, Mr.



(Testimony of C. W. Baruth.)

Stephenson received a check for \$200.00; on November 30, the Accounts Receivable Department credited his account with \$205.04, which was the amount of an expense report; on December 15, Mr. Stephenson was given a check in the amount of \$200.00; on December 29, the company purchased for Mr. Stephenson a fare to Chicago which was not accounted for on any of Mr. Stephenson's expense accounts; on December 29, expense report was credited to Mr. Stephenson in [252] the amount of \$261.25; on December 29 an additional expense report in the amount of \$34.30 was credited to Mr. Stephenson's account; and then on December 29, Mr. Stephenson received a check in the amount of \$300.00; and on the 27th he got a check from Everett in the amount of \$200.00——

Q. 27th of what?           A. December, 1950.

Q. And how much did he receive over that period, October through the end of December?

A. \$2,119.36.

Q. As expense advances?           A. Yes, sir.

Q. And how much did he turn in as expense reports during that period?           A. \$787.85.

Q. And you subtracted the \$700.00 from the \$2,200.00 item?           A. \$2,100.00 item.

Q. And you got a figure of——

A. \$1,331.51.

Q. And you added that to the balance for the period ending September 1, 1951, did you?

A. Yes, sir.

(Testimony of C. W. Baruth.)

Q. What total did you get then?

A. \$2,686.46.

Q. As being the sum of monies Mr. Stephenson had received from [253] Alaska Airlines as expense advances but had turned in no report to cover it?

A. Correct.

Q. I show you Defendant's Exhibit E; now, Mr. Baruth, up to this point in dealing with these expense accounts, we have assumed everything Mr. Stephenson reported as an expense had been allowed, have we not? In other words, you have not disallowed a single item on any of these reports?

A. Only the errors in addition.

Q. But you are just assuming that when he said \$77.00 for meals that he actually was entitled to \$77.00? A. Right.

Q. And he still comes out owing the company \$2,600.00, or thereabouts? A. Yes, sir.

Q. Now, in Exhibit E, I believe you testified you used the recap sheet and listed the items in the expense reports that were disallowed, is that correct?

A. Yes, sir.

Q. Will you, without going into each item, explain briefly so the jury will be able to look at this sheet when they go out, and mark the items not properly supported; explain why you, in preparing Exhibit E, disallowed those items listed on his account?

A. Do you want to take each individual expense account? [254]

(Testimony of C. W. Baruth.)

Q. Pick one at random so they'll get an idea how you did it.

A. March 11 to March 17, expense report for the trip to New York; the expense report as submitted was \$189.61; the audited amount was the same, however, items which were not properly supported by receipts, vouchers or other documents—item of air fare, \$5.00; automobile expense, \$1.80; taxi fare, \$16.35; telephone and telegraph, \$34.39; hotel bill, \$52.58; making a total unsupported of \$110.12 which, when subtracted from the expense report as submitted by Mr. Stephenson and audited by Alaska, left a net expense allowable of \$79.39.

Q. Then, in the last two right-hand columns here, you have one column marked Total Unallowed, for each of these expense reports, and the Net Expense Allowable, which is the figure he has supported by vouchers, is that correct?

A. That is correct.

Q. And you have totalled those at the bottom of the columns?      A. That is correct.

Q. Now, why, for example, were all those items disallowed that were under the caption Disallowed, not properly supported?

A. Air fare was not supported by an airline traffic ticket; automobile expense was disallowed for the reason there was no support; taxi fare was disallowed because there was no explanation as to the reason for taking a taxi, nor from what point to what point; telephone and telegraph included long distance calls, and it is the policy of the company

(Testimony of C. W. Baruth.)

to require [255] explanation of why a long distance telephone call is made, by whom made, to whom made, and the location; hotel of \$52.58 was not supported by a voucher.

Q. If those items had been supported by any pencil notation giving information, parties, names, if prepared, would those items have been allowed to Mr. Stephenson?      A. They would, yes, sir.

Q. Were you acting under the instructions given by Mr. Stephenson in auditing the expense reports in this manner?

A. Mr. Stephenson agreed with me that the expense reports should be properly supported or should be denied.

Q. What total did you get on the next to the last column on the right side as unallowed expense items for the period February through September, 1951?

A. \$1,677.75.

Q. And the amount that was properly supported, what is that total?      A. \$3,060.44.

Q. All right, now, Mr. Baruth, this tabulation does not deal with meals so far as I have gone, does it?      A. No, sir.

Q. Now, what did you do in connection with all the meal items that Mr. Stephenson had included in his reports?

A. Well, all meals in excess of \$10.00 for himself personally were charged back for the reason they were not properly explained as to who Mr. Stephenson may have entertained or for [256] what reason the entertainment was given.

(Testimony of C. W. Baruth.)

Q. If Mr. Stephenson had submitted a memorandum, or bill, stating the names of the persons and the reason for the entertainment, then would he have been allowed it?      A. Yes, sir.

Q. Did you prepare a recap of the meal items?

A. Yes, I did.

Q. Do I have it?      A. Yes, sir.

Q. Is this it?      A. Yes, sir.

Q. Did you prepare that paper?

A. I prepared this, or had this paper prepared from a list of items which Mr. Marshall had deleted when he reviewed the expense accounts in Everett.

Q. What did you use as a basis for it, the expense reports in Defendant's Exhibit A?

A. Mr. Marshall reviewed the expense reports and as he went over them he jotted down these dates and the amounts.

Q. What is the total amount of monies requested by Mr. Stephenson in connection with meals, that were disallowed?      A. \$856.63.

Q. That being the amount of meal money that he claimed over and above what he was entitled to—that is, \$10.00 for meals?      A. Yes, sir. [257]

Q. Did you use that report to enter the item on Exhibit E at the bottom of the page, No. (1) Charge-back Meals in excess of \$10.00 per day per schedule attached?      A. Yes, sir.

Q. And \$856.63 was the total sum, was it not?

A. Yes, sir.

Q. And then how did you handle the \$856.63 on Exhibit E?

(Testimony of C. W. Baruth.)

A. Deducted it from Net Expense Allowable of \$3,060.44.

Q. And what figure did you reach then, after your subtraction had been made?

A. \$2,203.81.

Q. Now, there is an item marked (2) at the bottom of Exhibit E, Eliminate Cash advances obtained from hotels as these advances were not included in expense report items; explain that briefly.

A. I added back the \$563.00 in cash advances obtained from hotels for the reason they were not included in his expense report nor charged to the company.

Q. In other words, you gave him credit for that because although he might have received the money from the hotel he didn't charge the company for it?

A. That is correct; the result would have been the same if we had not dealt with the advances at all.

Q. At the bottom of Exhibit E you have Adjusted Totals; that is the adjusted total of each and every one of those columns, [258] is it not?

A. Right; adjustments in any meals and cash advances; there were no other adjustments.

Q. In the last two columns on the right-hand side, what is the total unallowed?

A. \$1,971.38.

Q. And that is the sum of monies asked for that was not supported?      A. Correct.

Q. And the total amount allowed—what is that total?      A. \$2,766.81.

(Testimony of C. W. Baruth.)

Mr. Nesbett: Your Honor, I would like to offer this meal recap into evidence.

The Court: You may show it to counsel. Is there a copy of that available?

Mr. Nesbett: Yes, sir.

The Court: Obviously this can go in only as illustrating the testimony of the witness and for no other purpose. Is there objection to its admission upon that ground?

Mr. Hughes: No objection.

The Court: Very well; it may be admitted. Ladies and gentlemen of the jury, this paper, which will be marked Defendant's Exhibit G, is admitted only to illustrate the testimony of the witness. It has no evidentiary value otherwise. It is so you can have before you in detail what the witness has testified to on this subject, because it is impossible to remember all of these items. [259]

Mr. Nesbett: Your Honor, I think I am through with this witness, but I wonder if I could have just five minutes to be sure.

The Court: Very well; the court will stand in recess for five minutes.

(Whereupon the court recessed from 11:00 o'clock a.m. until 11:05 o'clock a.m., at which time the following proceedings were had):

The Court: Is there any further direct examination?

Mr. Nesbett: Just a question or two.

Q. (By Mr. Nesbett): Mr. Baruth, can you re-

(Testimony of C. W. Baruth.)

fresh your memory by looking at these figures, and state what was done in connection with salaries not paid to Mr. Stephenson by Alaska Airlines until October 15, 1951?

A. We prepared a previous statement, Mr. Nesbett—I think the date is September 11th, which showed a balance due Alaska Airlines of \$7,623.74.

Q. That was Exhibit 6. All right, then; salaries to Mr. Stephenson were withheld for certain periods by reason of the unbalance in his accounts, were they not? A. Yes, sir.

Q. What were those periods?

A. August 1 to August 15; August 16 to August 23; they would appear on the statement as of September 11th. [260]

The Court: Plaintiff's Exhibit 6. Statement dated September 11, 1951, from the company to Mr. Stephenson.

A. Then we gave Mr. Stephenson's account additional credits from a private payroll dating from August 24 to August 31, \$302.70; September 15, Mr. Stephenson's account was credited from private payroll for the period 9/1 to 9/15/51, \$543.00; September 30, credit from private payroll for the period September 16 to September 30, \$543.30. October 15, credit from payroll, October 1 to October 15, \$543.30; and then on October 25, after we had made the complete audit of the expense reports which had not yet been submitted, I think that's Exhibit E, we credited Mr. Stephenson's account with \$2,766.81.



(Testimony of C. W. Baruth.)

Q. That is the figure taken from Exhibit E?

A. Yes, sir.

Q. Leaving what total to be due and owing from Mr. Stephenson to Alaska Airlines?

A. \$2,924.33.

Mr. Nesbett: I believe that's all, your Honor.

The Court: Counsel for plaintiff may examine.

### Cross-Examination

By Mr. Hughes:

Q. Mr. Baruth, calling your attention to Exhibit G, which is apparently arrived at from Exhibit E—G and E—now, did you state that you prepared both of these, sir? [261]

A. I said I had this typed from a list of amounts Mr. Marshall had denied. Exhibit E, however, is one I prepared.

Q. I see; now, did you go through Exhibit G and check it for correctness? A. Yes, I did.

Q. And you found that to be correct, sir?

A. No; there was \$2.20 difference, Mr. Hughes.

Q. Mr. Marshall's figures as you audited them were \$2.20 in error?

A. \$2.22 greater than the figure I arrived at.

Q. Other than that did you find any errors?

A. No, sir.

Q. Now, then, the total of \$856.63 is the correct amount as you audited it, and made the allowance of \$2.22?

A. I didn't audit these figures, Mr. Hughes,

(Testimony of C. W. Baruth.)

until after I came to Anchorage, then went through each expense report and made a listing, and my total was \$2.22 less, which would bring it down to \$854.41.

Q. All right, then; \$854.41 is correct, then, now?

A. Yes, sir.

Q. You established that? A. Yes, sir.

Q. All right, now, let's take these items for meals, then, as shown on Exhibit G, and will you refer to Exhibit A, or whatever else you referred to to check them, and show us where that item is listed—that is, the period March 11, 1951—you are [262] looking for the figure of \$31.50, now.

A. Judging from the figure which is on Exhibit G and the expense report, it is my assumption that was taken on a period total for the period March 11 to March 17th, where meals are shown as \$79.49; there are two items which could well make up the \$31.50; that would be on March 13 and March 14.

Q. Now, you said you are assuming that that is for the period March 11 to 17? A. Yes.

Q. Well, then, you don't know exactly—there is no such figure as \$31.50 there, is that correct?

A. Not on the expense sheet, no, sir; there is a combination of figures which will make up more than that.

Q. There is a combination of figures there making up a good deal less than that, too, isn't there?

A. Well, it would be very close.

Q. Well, how did you arrive at \$31.50; that is the question.

(Testimony of C. W. Baruth.)

A. I didn't; I told you Mr. Marshall did.

Q. You said you audited it, Mr. Baruth.

A. I did; Mr. Nesbett has my audit.

Q. You said it is correct? A. No, I didn't.

Q. Am I mistaken, now? You said you audited this sheet when you came to Anchorage, and found \$851.41 to be the true figure and that you audited it and it was correct? [263]

A. Mr. Nesbett has the figure; it has not yet been handed to me. I took each expense account and each day; I did not take period figures; I took daily figures.

Q. Well, then, your date of March 11, 1951, as shown on this Exhibit G, you didn't find any such figure as \$31.50? A. That is correct.

Q. Well, then, is it possible that this is an error?

A. No, I would not admit that statement is in error, because there are figures here which would come to more than \$31.50.

Q. Well, do you have a daily sheet?

A. Mr. Nesbett has the daily sheet.

Q. Well, don't you have it in Exhibit A—your vouchers?

A. I have it according to Mr. Stephenson's figures, yes.

Q. What other figures are there, Mr. Baruth?

A. You are talking about two different things, Mr. Hughes. You are talking about Exhibit G, which I specifically stated was prepared by Mr. Marshall.

(Testimony of C. W. Baruth.)

Q. Well, now, do you—what purpose does it have in your testimony, then?

A. That there were meals in excess of \$10.00 a day; there's three days on this expense report in which the meals were in excess of \$10.00 a day; for example, on the 13th of March, \$14.25; 14th of March, \$17.89; and on the 15th of March, \$12.55; March 12, \$9.95; March 16, \$7.95; March 17, \$8.20.

The Court: May I ask a question? Mr. Baruth, referring to [264] Exhibit G, did you personally check the figures on that, or did you take it on the faith of Mr. Marshall's data?

Mr. Baruth: I accepted these figures in the first instance, your Honor, and when I came to Anchorage I checked the \$31.50 figure and didn't find it there, so I went over all these expense reports and took each individual day, and that is on a subsequent schedule which I gave to Mr. Nesbett.

The Court: Do you know whether the figures on Exhibit G are correct or not?

Mr. Baruth: No, I don't.

The Court: I think Exhibit G ought to be stricken, then; the witness doesn't know whether they are correct figures or not. Exhibit G will be stricken. I understood the witness checked the figures; if he has not, let Mr. Marshall testify to that.

Mr. Nesbett: Maybe it will shorten things if we put this before Mr. Baruth; apparently this is a check on Exhibit G.

Mr. Baruth: It is.

(Testimony of C. W. Baruth.)

Mr. Hughes: If I am not mistaken, Mr. Baruth has testified—I thought first that he had checked it and it was correct; now he says that he didn't and he doesn't know it is correct; now counsel is intending to introduce something that shows he had checked it.

Mr. Baruth: After I came to Anchorage, Mr. Hughes—

Mr. Nesbett: Just a minute, Mr. Baruth; there is a little confusion here. I had Mr. Baruth check Exhibit G; I thought he [265] could reconcile Exhibit G with the figures; apparently he can't. Here are his compilations where he checked every day and came almost to Exhibit G. If it will shorten the trial I will hand this in. The total figure, your Honor, does not vary but very slightly, but apparently Mr. Baruth, with Exhibit G, can't reconcile the figures; however, here is a day by day work sheet on it.

The Court: I will ask counsel for plaintiff to suspend and I will let counsel for defendant reopen his case and ask any questions he desires. Exhibit G is stricken.

Mr. Nesbett: I don't want to reopen my case, your Honor; I haven't rested.

The Court: Well, you will have to reopen your case; otherwise you can't offer anything at this stage of the game.

Mr. Nesbett: I assume it could go in on redirect.

The Court: Yes, but this is no time for redirect.

(Testimony of C. W. Baruth.)

Redirect comes in after counsel for plaintiff has examined the witness.

Mr. Nesbett: Very well.

Direct Examination

(Continued)

By Mr. Nesbett:

Q. Can you recognize that sheet, Mr. Baruth?

A. Yes, sir.

Q. What is it?

A. Schedule of chargeback for meals in excess of \$10.00 per day as reported on Mr. A. W. Stephenson's expense reports. [266]

Q. Did you prepare it?           A. I did.

Q. What did you use as a basis to reach those figures?

A. The total expense reports in Exhibit A.

Mr. Nesbett: We offer that in evidence.

The Court: It may be shown to counsel for plaintiff; is there a copy available? According to your view of the facts, that proffered exhibit, now, is correct to the best of your knowledge?

Mr. Baruth: Your Honor, I attempted to reconcile these figures that Mr. Marshall had with these and they didn't check so I personally checked the exhibit myself and went through every expense account.

The Court: Mr. Marshall's figures are out; he is not an auditor or accountant so far as I know; he may be, but he hasn't testified yet, and I don't know. Exhibit G may be returned to counsel for

(Testimony of C. W. Baruth.)

defendant at this time. Now this proffered exhibit, I think, may be admitted in evidence to illustrate the testimony of the witness. He himself says it is correct; he has made an examination of the vouchers and that is the result at which he arrived.

Mr. Hughes: Well, now——

The Court: Is there objection?

Mr. Hughes: Excuse me, your Honor. I would object to this as not being the best evidence, if in fact Exhibit A contains all of the vouchers and the report of Mr. Stephenson, and the original [267] entry.

The Court: Yes, but what judge or what jury can sit down and go through all of the vouchers in Exhibit A and figure them out by themselves? It's got to be simplified and put together in one statement according to the testimony of the witness, then it can be checked against the vouchers. I think, upon reflection, that Exhibit G should remain with the clerk since it has been admitted and may be admissible by and by, but for the present it is stricken.

Mr. Hughes: No objection.

The Court: Without objection it may be admitted only to illustrate the testimony of the witness, and may be read to the jury or considered as read in the usual fashion. This will be Exhibit H.

Mr. Nesbett: One question.

Q. (By Mr. Nesbett): Mr. Baruth, how did you prepare Exhibit H?

A. By taking the daily figure on Mr. Stephen-

(Testimony of C. W. Baruth.)

son's expense report, which he represents as meals, and putting the amount down beside that date in the column headed, I think it reads, "As Reported by Mr. Stephenson," and in the next column I show meals in excess of \$10.00 per day. Subtract \$10.00 from the first column and put the balance in the second column.

Q. You didn't take the total amount requested for meals and divide it by the number of days he was in transit? [268]

A. No; I took each individual day reported by Mr. Stephenson.

Mr. Nesbett: That's all.

The Court: All right; counsel for plaintiff may examine.

#### Direct Examination

(Continued)

By Mr. Hughes:

Q. Now, Mr. Baruth, referring, if you will, to your Exhibit H, did you, by the calculating as shown on Exhibit H, arrive at a figure of meals disallowable to the account of Mr. Stephenson?

A. Yes, sir.

Q. And what was that figure?

A. The total figure is \$854.41.

Q. Well, then, according to your statement, then, Exhibit E of the Plaintiff's should be amended, is that correct?

A. With respect to adjustment No. 1 which was chargeback for meals in excess of \$10.00 per day;



(Testimony of C. W. Baruth.)

the figure on Exhibit E should be reduced by \$2.22, and reflect a total of \$854.41.

Q. Now, that is the only modification, though, that you wish at this time to make in regard to Exhibit E, is that right?      A. Yes, sir.

Q. Otherwise it is correct?      A. Yes, sir.

Q. All right; now, then, for the period of March 11, 1951, as you compute this, how much did Mr. Stephenson spend for meals—how much did he report?

A. On March 11 Mr. Stephenson reported [269] \$8.70.

Q. And the next day, I believe——

A. The 12th he reported \$9.95.

Q. Just a minute; what was the first one?

A. On March 11, \$8.70.

Q. And on the 12th?      A. \$9.95.

Q. And what was the 13th?      A. \$14.25.

Q. And the 14th, the next day?

A. March 14, \$17.89.

Q. And the 15th?      A. \$12.55.

Q. And the 16th?      A. \$7.95.

Q. In regards to April 22, what do you find?

A. There were no expense reports submitted from March 18th—between March 18 and March 23; the next group of expense reports is for the period March 24 through March 30; there is no report for the 22nd.

Q. The 22nd of April?

A. You said March.

(Testimony of C. W. Baruth.)

Q. I'm sorry; for April 22, 1951, what does your record disclose there?

A. April 22nd, meals, \$29.46.

Q. And where are you taking that from, [270] sir?

A. From the expense report as submitted by Mr. Stephenson.

Q. May I see that? A. Yes, sir.

Q. Now, that's for meals on the 22nd, is that right? A. Yes, sir.

Q. Now, then—I will return this to you so you don't get it out of order—but would you be looking for the 16th day of June, 1951?

A. I have June, Mr. Hughes.

Q. The 16th, please. A. \$24.60.

Q. I notice, Mr. Baruth, that the date is not established except by red pencil; did you put that on yourself?

A. I checked it against the calendar.

Q. Well, there weren't any—you changed the original date at the top, then, of the period from June 16 to 23—you changed that period, didn't you?

A. I can't tell without looking at the expense report.

Q. Mr. Stephenson showed June 17th when it was actually June 16th?

A. June 16th was on a Saturday, June 17th was on a Sunday.

Q. That is your change, anyway; you changed it?

A. The red figures are mine, yes, sir.

(Testimony of C. W. Baruth.)

Q. Now, then, would you look for the 27th day of June; what do you find there, sir, for the meals?

A. On the 27th of June, meals, \$6.55. [271]

Q. That's on the 27th of June?

A. Yes, sir.

Q. You likewise changed the dates on this, didn't you, Mr. Baruth?

A. If the figures are in red, yes, sir.

The Court: In making these records, when is the week supposed to commence—on Sunday every time?

Mr. Baruth: They would ordinarily, your Honor, but the expense reports are drawn up in such a way—the form—that the week begins on a Monday.

The Court: Well, why were these changes in red pencil made as to the beginning of the week, so as to conform to the practice of beginning the week on Monday?

Mr. Baruth: Yes, sir, it was to conform to the calendar. I checked the dates on the calendar for the over-all period for which reports were submitted and then checked the vouchers to make sure the dates were in order.

Q. As a matter of fact, Mr. Baruth, didn't you arrive at the figure of \$854.41 by totalling all of the meals listed on the expense reports?

A. No, sir; \$854.00 is the amount of meals in excess of \$10.00 per day for the period from February 17th through August 9, 1951.

Q. Did you have any part in submitting the statement to Mr. Stephenson under date of Sep-

(Testimony of C. W. Baruth.)

tember 11th, or September 19th— [272] you weren't here, were you, Mr. Baruth? A. No, sir.

Q. Did you prepare that for transmittal to him?

A. It was prepared by the Accounts Receivable Department under my supervision.

Q. Now, in regard to the item shown in Exhibit E for the period of March 11 through 17, you say there—of an item of \$5.00—you say that that is unsupported, is that correct? A. Yes, sir.

Q. And in regards to the item \$86.25, likewise shown on Exhibit E, that is unsupported also, is that correct? A. Yes, sir.

Q. Now, will you show us how that is unsupported, sir—refer back to your Exhibit A and show us how this \$86.25 is unsupported?

A. On April 3rd, Mr. Stephenson has an item in there of \$345.00 air fare on Northwest Airlines. Alaska Airlines is entitled to a 25% discount, and 25% of \$345.00 is \$86.25.

Q. Now, as a matter of right, you mean to say, Mr. Baruth, that you walk down here to Northwest Airlines and buy a ticket and they just say that's 25% off?

A. If you are an officer of an airline you are entitled to it.

Q. Are you an officer of an airline?

A. I am.

Q. You can walk right down here and get a ticket with 25% off, is that right? [273]

A. No; I have to contact the proper official of Northwest Airlines.

(Testimony of C. W. Baruth.)

Q. You want to leave this afternoon and you are going down there and you want to fly from here to Idlewild and you want to tender them 75% of the fare, how do you do it?

A. I can't answer a hypothetical question, Mr. Hughes.

Q. Where have you flown on Northwest?

A. I have never flown on Northwest.

Q. Have you ever flown to Seattle from here?

A. No; this is my first trip.

Q. Where have you flown?

A. From Seattle, Washington, to San Francisco and Los Angeles on United.

Q. All right; Northwest flies that line, doesn't it, from Seattle to Washington, D. C.—do you know?

A. I don't know.

Q. Where was Mr. Stephenson's ticket for?

A. To New York.

Q. All right; did they go to New York?

A. Yes; they went to New York, Minneapolis, St. Paul, Seattle—

Q. You are going to fly that route and you are leaving today; now you are going to the Northwest ticket office and tender that 75% of the ticket and you can get it, is that correct?

A. If I introduced myself to the proper executive of Northwest Airlines, the 25% discount would apply.

Q. You can do that just immediately? [274]

A. Providing I have my pass designating my officer status with Alaska Airlines.

Q. All you would have to do is show your pass?

(Testimony of C. W. Baruth.)

A. My pass for Alaska which designates me as an officer of Alaska Airlines.

Q. Do you go ahead of pay passengers, then, if they've got a full load?      A. Oh, no.

Q. You would have to wait?

A. That's right; revenue passengers go first.

Q. Well, then, if you wanted to go today, you would show your pass and they would say, "We will think it over," is that correct?

A. That's just about what they would say, yes, sir.

Q. And, "We will let you know as soon as space is available," is that correct?      A. Right.

Q. Well, then, as a matter of fact, if Mr. Stephenson had business and he had to leave on short notice, he couldn't get that without paying the full fare ticket, could he?      A. I wouldn't know.

Q. What does his ticket show there—did he pay a full fare or didn't he?

A. I am not acquainted with Northwest tariff from New York to Seattle. \$345.00 seemed to me to be a full fare. [275]

Q. Is that what it says on the ticket?

A. There is no indication on the ticket; the amount is \$345.00.

Q. Is that what Mr. Stephenson put on his expense account?      A. He put \$345.00.

Q. Just what the ticket showed?

A. That's right.

Q. Well, if he had paid that \$345.00 for the ticket, you mean to say that in auditing, you arbi-

(Testimony of C. W. Baruth.)

trarily chopped it off, and he has the proof to show that he paid it?

A. All Alaska Airlines is entitled——

Q. Just answer that question; did you arbitrarily chop it off when the ticket shows you he paid \$345.00 for the ticket?

A. Yes; because we are entitled to 25% discount.

Q. Even though he's paid it, it doesn't make any difference?

A. That is correct; he shouldn't have paid \$345.00.

Q. He should have waited a week, is that right?

A. In fact, Mr. Stephenson told me that he always travelled on Northwest at a reduced rate. or on a pass.

Q. Well, did he on this occasion?

A. No; it would appear that he paid \$345.00.

Q. All right; will you take a look at March 15th or 16th. Can you, from looking at that expense account, at this time determine where Mr. Stephenson was, as disclosed by the expense account?

A. According to the expense report for the period March 11 through [276] March 17th, Mr. Stephenson made a trip to New York.

Q. What does the air traffic show there?

A. \$5.00.

Q. Now, did you disallow that? A. I did.

Q. You disallowed the \$5.00, is that right?

A. Yes, sir.

(Testimony of C. W. Baruth.)

Q. The company policy is such that if a man gets to New York and it doesn't cost him anything except \$5.00, you would have to cancel it?

A. There is nothing in the records to show, Mr. Hughes, that he did that—no airline ticket attached to the vouchers to know that he paid \$5.00.

Q. He never charged you anything for it, anyway, is that right?

A. He charged \$5.00 on the expense report.

Q. All right, now; let's take a look at your expense account June 3 to June 9; now, during that period you disallowed \$30.19, according to Exhibit E, for air fare, is that right?      A. Correct.

Q. All right, now, where was that trip?

A. According to the ticket it is Seattle, Washington to Anchorage, Alaska.

Q. And what was the over-all fare?

A. \$120.75.

Q. And was that with Northwest or some other line? [277]      A. Northwest Airlines.

A. Northwest Airlines.

Q. \$120.00?      A. And 75c.

Q. And what is the date there?

A. On the travel ticket it is dated June 9th and on the expense report it is reported as of June 9th.

Q. That must be correct, then?

A. Yes, sir.

Q. Now, then, what was your procedure in disallowing \$30.19?

A. That was the 25% discount.



(Testimony of C. W. Baruth.)

Q. And what does the ticket show that Mr. Stephenson spent? A. \$120.75.

Q. This is, then, a similar situation to the last one, is that right? A. Yes, sir.

Q. Now, then, for the period of June 24 to June 30, now, you find a charge there of disallowance of \$42.65? A. That is correct, sir.

Q. And what airline was that with?

A. Northwest Airlines.

Q. Now, what was the face amount of the ticket?

A. \$170.60.

Q. And you allowed, then, \$123.00, plus?

A. Yes, sir.

Q. You said that was on Northwest? [278]

A. Yes, sir.

Q. Now, if you take a look at August 5 to 11; now, during that period you disallowed \$30.19, is that correct? A. Yes, sir.

Q. And what airline was that?

A. Northwest Airlines.

Q. What was the amount of the ticket?

A. \$120.75.

Q. And how much did Mr. Stephenson bill you for? A. \$120.75.

Q. Did he likewise bill you in each of these cases for the exact amount he had paid for the ticket? A. He did.

Q. Now, then, why was it that you disallowed it then?

A. As I told you before, Alaska Airlines is entitled to 25% discount, or rebate; by Mr. Stephen-

(Testimony of C. W. Baruth.)

son's own word to me, he either got a 25% discount or travelled on a pass.

Q. In certain cases he did, is that right?

A. I don't know; if he travelled on a pass, we wouldn't have any record of it.

Q. Isn't it shown by your records, there—he went from Seattle to New York and only charged you \$5.00 under date of March 11th, or somewhere along there?

A. There is nothing in the papers, Mr. Hughes, to support the \$5.00. [279]

Q. Well, isn't it established by those records that he did go from Seattle to New York?

A. That is correct, according to his expense report.

Q. And he didn't walk, did he? A. No.

Q. All right; how long a period did it take him to get there—it was all within this one week, wasn't it? A. Yes.

Q. Is it the policy of the company that you must charge him whenever he can't get a 25% discount and take all the advantages of his pass?

A. If Mr. Stephenson had made any reference in his report as to what the \$5.00 was for, it would have been allowed, but there is no reference to it at all.

Q. Is there any occasion when a man would be justified in charging Alaska Airlines just exactly what it cost him for his transportation?

A. Yes, sir.

Q. There are? Well, was Mr. Stephenson ever

(Testimony of C. W. Baruth.)

granted such a privilege of getting his money back for the transportation he paid?

A. From Mr. Stephenson's own word to me, he always got 25%, but we didn't see any reflection.

Q. You have one there that shows 100% savings to the company, is that correct? [280]

A. From the standpoint of air fare, yes.

Q. Who set this policy that you are speaking of—this policy that allows people to get only 75% of what they have actually paid for their air transportation?

A. You see, Mr. Hughes, Mr. Stephenson told me himself.

Q. Who set the policy?

A. Mr. Stephenson.

Q. He did? A. Yes, sir.

Q. Well, then, he told you never give him more than 75% on an airplane ticket, is that correct?

A. Mr. Stephenson said he could get a ride on Northwest Airlines any time at 25% off.

Q. That was the reason you charged him, then?

A. That's right.

Q. Then there wasn't any policy that you had to charge it back to him—no company policy that you must charge him back 25%?

A. No, there was no company policy, but when a man gets 25% discount, that discount should carry to the company, not to the individual.

Q. When he got it once, he got it always?

A. I don't know that he got it once.

Q. Will you look at that paper you have in your

(Testimony of C. W. Baruth.)

hand—you know he got something there, don't you?

A. Yes; quite often. [281]

Q. It was all right for him to do that, but the minute he couldn't get a ticket for free, you are going to chop him down to 75% of what he spent.

A. There wouldn't have been anything to it if he had put an explanation there. All I have here is air fare; I don't know how he does it; all we go by is supporting papers attached to the vouchers——

Q. I will ask the question——

Mr. Nesbett: Let him answer.

Q. Did you state that Mr. Stephenson never gave the company advantage of a discount, Mr. Baruth?

A. I don't believe I made that statement.

Q. Well, isn't it a fact that he did give the company advantage of discount whenever his tickets indicated that he got it at a discount?

A. The only one that would appear to me would be this March 11 to March 17, where he went to New York for \$5.00.

Q. I will call your attention to March 24 through March 30, and ask you if there isn't a disclosure that on the 26th day of March Mr. Stephenson got a \$113.40 ticket for \$86.25?

A. According to Mr. Stephenson's expense report for the period March 24 through March 30, there were two air fare charges, one on March 26th for \$113.40, for which there is no support, and on March 30th, for \$86.25, which is supported by a ticket.

(Testimony of C. W. Baruth.)

Q. Where is that ticket from? [282]

A. \$86.25, ticket on the 30th, is from Anchorage, Alaska, to Seattle, Washington.

Q. Well, then, there were two occasions when he did give the company advantage, wouldn't you say, of the discount, Mr. Baruth?

A. Yes, because the ticket is clearly marked 25% off.

Mr. Hughes: Your Honor, I call your attention to the clock on the wall. I would like to conclude the cross-examination after the lunch hour, if I might. There is considerable of these reports—

The Court: Ladies and gentlemen of the jury, the trial will be continued until 2:00; in the meantime, you will remember the admonitions of the Court as to your duty. The Court will stand in recess until 1:30; the jury will return at 2:00.

(Whereupon, at 12:02 o'clock, p.m., the trial of the above-entitled cause was continued until 2:00 o'clock p.m.)

(Be It Further Remembered, That at 2:00 o'clock, p.m., on the 17th day of March, 1952, the trial by jury of the above-entitled cause was resumed; the members of the jury panel being present and each person answering to his or her name; the parties being present as heretofore, the Honorable Anthony J. Dimond, district judge, presiding.)

(And Thereupon, the following proceedings were had):

(Testimony of C. W. Baruth.)

The Court: The Witness Mr. Baruth may resume the stand; counsel for plaintiff may proceed with examination. [283]

Q. (By Mr. Hughes): Mr. Baruth, did you not testify that on the 31st day of December, 1950, that Mr. Stephenson owed the Alaska Airlines the sum of \$1,354.00?

A. You mean \$1,354.95?

Q. Well, that's the figure, I believe.

A. No; that's what he owed Alaska Airlines at September 1, 1951, taking into consideration only those group of expense reports submitted from February 11 to and including September 1, 1951.

Q. Well, did you or did you not testify that Mr. Stephenson owed the Alaska Airlines the sum of \$1,331.51 as of the 31st of December, 1950?

A. Yes, sir.

Q. He did? A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Now, then, Mr. Baruth, did you prepare Exhibit E? A. Yes, sir.

Q. Did you likewise prepare Exhibit 6 of the Plaintiff's exhibits?

A. I do not have it, Mr. Hughes.

Q. Well, it's available, there.

The Court: The clerk may hand the witness the exhibit.

Q. It is a statement of analysis of account, September 11, 1951.

A. No, I did not prepare that statement; it was

(Testimony of C. W. Baruth.)

prepared by our [284] Accounts Receivable Department.

Q. Was it under your supervision?

A. Yes, sir.

Q. Did you check it?

A. No, sir; it conformed to the ledger card.

Q. Is your ledger card correct?

A. Yes, sir.

Q. Well, then, the statement must be correct, isn't that right?

A. Yes; this is a copy of our ledger card.

Q. And is that correct?           A. Yes, sir.

Q. I will ask you, Mr. Baruth, to read the debits from October 30, 1950, through December of 1950, as shown by this correct statement of your ledger.

A. Well, the debits are October 30, voucher 325, \$100.00; November 29, voucher 11-290, \$200.00; voucher No. 11-368, \$200.00; voucher 12-312, \$200.00; on the 29th of December, \$200.00; and December 29, voucher 12-318, \$219.36.

Q. Now, that is the extent of the debits for that period, up to the 31st day of December, 1950?

A. Yes, sir.

Q. Have you got a total of that there, sir?

A. No, sir.

Q. Well, you have read them all, anyway?

A. Yes, sir. [285]

Q. Now, will you read the credits for the same period?

A. October 30, voucher 10-469, \$287.26; November 29, voucher 11-424; \$205.04; December 29,

(Testimony of C. W. Baruth.)

voucher 12-280, \$21.05; December 29, voucher 12-532, \$261.25; voucher 12-206, \$34.30; that is the end of the credits for that period.

Q. Now, then, the difference between those two figures should be the debit balance of Mr. Stephenson, then, isn't that correct?      A. Yes, sir.

Q. And do you know whether or not that is the figure you just recited as the balance due to Alaska Airlines in the amount of \$1,33——

A. That statement, Mr. Hughes, the \$1,331.00 was the reconstructive statement which I made up merely to reconcile the balance, compare the ledgers with the balance taken from Mr. Stephenson's expense reports, without any consideration being given to disallowed items, and that statement was not entered into the records as being correct. This is the correct statement here.

Q. You say this one is not correct, then?

A. This is; this is from our ledger card.

Q. Well, then, whatever the debit balance is as shown from your ledger card would be the correct amount, is that right?      A. That is correct.

Q. Well, do you now know whether or not those figures, that is, the credits subtracted from the debits, will equal \$1,331.51?

A. If I may have the privilege of referring to Exhibit H, I think [286] it is, or G——

Q. You may see both G and H.

The Court: G was withdrawn.

Mr. Baruth: It is the reconciliation of accounts; it is on accounting paper—blue paper——



(Testimony of C. W. Baruth.)

The Clerk: There is no blue paper here that I can see. They are all in order; if they can give me the heading I can find it.

Mr. Baruth: There is no heading; it was merely a work sheet.

The Clerk: This Exhibit H—the last one?

Mr. Baruth: No; it is a bluish green paper.

The Clerk: Exhibit F, Balance Cash from Final Expense Report.

A. That's it. This \$1,331.51 figure came from the scratch work sheet which I made by trying to reconcile the statement of \$2,900.00 with the period from October, 1950, to December 31, and also the balance as of September 1 from the expense reports for the period February 11 to September 1, 1951.

Q. Well, now, without regard to what you were trying to do there, Mr. Baruth, and without regard to your reconciliation, isn't it a fact that your total credits for the period under discussion, that is, from October through December 31, would amount to \$807.90 if you can compute that to check——

A. I will tell you where the difference is——

Q. Let's follow through, Mr. Baruth, and see how this comes out. Isn't it a fact that your total credits for the period under discussion now is \$807.90—will you compute that—just take [287] time to do it, sir.

A. I have credits of \$808.90; debits of \$919.36.

Q. Now, that's taken from the credit books of the account of Alaska Airlines, is that right?

(Testimony of C. W. Baruth.)

A. Yes, sir.

Q. That doesn't equal \$1,331.00, does it, and 51c—that is, the difference between those figures?

A. The difference didn't pick up two December items, Mr. Hughes, which total \$500.00.

Q. Then the books are not correct, is that right?

A. Because of the lapse there of time in getting the figures down from Anchorage.

Q. Then when you answer the question just say it is right or wrong and we won't go into these differences, but as it stands, do you want to change your statement—the books are not correct?

A. The books are correct up to that point as far as the information we had.

Q. Well, then, when did you audit this Exhibit No. 6?

A. Exhibit 6 was prepared on September 11, 1951, by the Accounts Receivable Department.

Q. You mean to say, then, that there was information that should have been in the first day of January of 1951, and you didn't get it until after September 11th, is that right?

A. It made no difference, Mr. Hughes.

Q. I beg your pardon? [288]

A. It made no difference.

Q. Well, did you or didn't you get it?

A. No, we didn't get it; we didn't have Mr. Stephenson's expense accounts until way into September.

Q. You mean to say you didn't have his expense

(Testimony of C. W. Baruth.)

accounts for the period October 30 through December 31, 1950?

A. We had some of them but we didn't have two cash advances that he got in December.

Q. And you didn't get those until after September 19th, is that correct?

A. No; the statement of these two December advances of \$300.00 and \$200.00 were not included in this statement because the charges were allocated here as 1951. If you look at that statement, Mr. Hughes, you will find under date of February 28, 1951, there is voucher 12-202; now, that is a December voucher, expense advance, \$200.00, and right below that you will find voucher 12-524, again under the date of February 28, 1951, 12 being the month without designating it as December. Check No. 4511, \$700.00, and check No. 4513, \$300.00.

Q. Now, those checks that you just mentioned, more particularly check No. 4511, was that an expense account? A. Yes.

Q. Where did Mr. Stephenson report that?

A. That was a cash advance on an expense report.

Q. It was a cash advance? [289]

A. Yes, sir.

Q. Did you advance it?

A. No, sir; it was advanced from Anchorage, on the Union Bank.

Q. Well, did it involve the normal expenses of the company?

A. Well, at the point that the cash was advanced

(Testimony of C. W. Baruth.)

to him, we didn't know whether it was for moving expense or expenses on a trip?

Q. Do you know now?

A. It states here, Advance on Moving, \$700.00, and the Expense Advance, \$300.00. There is actually \$1,200.00, Mr. Hughes, which are December vouchers, which were not entered on the books of the company until the 28th day of February, 1951, the reason for that being that we did not have Anchorage information in Everett in time to post it on the card in 1950. The information was not made available to us until February, 1951; therefore, on my statement I took those items up in the proper date category, listing by date order, not by voucher order.

Q. So then, the statement of February 11 is correct, but it does not show the entries as of the exact date, that is, on that particular date it wouldn't show the proper balance, then?

A. That is correct.

Q. Now, then, calling your attention to Exhibit E, now, I believe that you made one modification on that in regard to the meals; you corrected that figure, didn't you, Mr. Baruth?

A. Yes, sir.

Q. That is now supposed to be \$854.41, if I am not mistaken, is [290] that correct?

A. That is correct.

Q. All right, now; did you submit this to Mr. Stephenson?

A. The revised statement on the meals.

(Testimony of C. W. Baruth.)

Q. Was this statement suffibmitted to Mr. Stephenson, if you know?

A. Yes, sir; schedule E?

Q. Yes. A. Yes.

Q. And calling your attention to the language at the bottom of the page there in the adjustment columns, there was another statement submitted along with it, wasn't there—this is only part of the document, in other words, isn't it?

A. Yes, sir.

Q. What went along with that?

A. Exhibit G which was stricken this morning.

Q. Did you check that before it went out to Mr. Stephenson?

A. No, sir; that was prepared by Mr. Marshall.

Q. Now, did you check Exhibit E so that you knew that was correct? A. Yes, sir.

Q. So that everything except the one correction on Exhibit E, that is, in regard to a modification of this figure \$854.41 instead of \$856.63, everything in there is correct, is that right?

A. In regards to that expense account which we were talking about before lunch, there was one item in there which I noticed today; [291] I deducted 25% and the charge as submitted by Mr. Stephenson on his expense report was correct, and the 25% air fare deduction should not have been made.

Q. That was one item that you shouldn't have deducted?

A. Yes, sir; I noticed that this morning.

Q. I see; that's two errors, then? Other than

(Testimony of C. W. Baruth.)

that it is all right?           A. Yes, sir.

Q. What particular item is that, where it should not have been deducted—the 25% air fare?

A. I would have to look at Exhibit A, Mr. Hughes, to determine; I think it's expense report from March 31 to April 16—I beg your pardon, sir—it's March 24 through March 30; there was one item in there of \$113.40 for air fare on March 26th for which there is no support, and air fare of \$86.25 on March 30th, against which I deducted 25%, or \$23.06, Mr. Hughes; that shouldn't have been deducted.

Q. I see no item of \$23.06, Mr. Baruth, on Exhibit E—if you will point it out to me.

A. I deducted \$86.25.

Q. What was the over-all fare in this case—isn't the \$86.25 the 25% which we are discussing?

Q. No; I deducted \$113.40, but did not deduct the \$86.25. The \$86.25 on the next expense report, March 31 through April 6, is 25% of the \$345.00 figure. [292]

Q. You mean that is a credit that you should have allowed—that \$86.25—you should have allowed that credit?

A. We did allow it. If you will notice this second item under air fare, \$113.40, that is on the report for March 24 to 30, Juneau, \$113.40—it is deducted. There is no support for that air fare, but the next report, March 31 to April 26, for a trip to New York, that's where I deducted \$86.25 as being 25% discount on \$345.00.

(Testimony of C. W. Baruth.)

Q. Now, isn't there a ticket in there for \$86.25, also?

A. No; that's on March 24 to March 24 to March 30, there is a ticket in here for \$86.25 which was allowed to Mr. Stephenson.

Q. Well, now, you pointed this out as an error. You say you later have credited \$86.25?

A. Yes; I gave him credit for \$86.25 because he has a ticket in here for \$86.25.

Q. All right, Mr. Baruth; aren't you confusing a couple of things here—you've got a ticket for \$86.25 and you were just discussing 25% of a three hundred and twenty some odd ticket.

A. By coincidence it happens to come out, Mr. Hughes.

Q. By coincidence; what did you do about it?

A. I allowed the \$86.25 air fare on the expense report for the period March 24 through March 30, 1951, and I deducted \$86.25, being 25% of \$345.00 for air fare claimed on April 3rd.

Q. Well, now, after all, you only gave him credit for the ticket that he bought, isn't that the final substance of it? [293]           A. Yes, sir.

Q. For the ticket he bought?           A. Yes, sir.

Q. You still knocked off \$86.25 that he spent and supported by a statement, isn't that correct—you still knocked that off?

A. Yes; but that is the next report.

Q. Regardless of where it is, you still disallowed it?           A. That's right.

Q. And it hasn't been changed?

(Testimony of C. W. Baruth.)

A. No, sir.

Q. All right, now; other than that, Mr. Baruth, is there anything else erroneous about this statement?

A. No, sir.

Q. All right; it is finally correct, now?

A. Yes, sir.

Q. All right, now, Mr. Baruth, calling your attention to the last exhibit of the defendant, Exhibit H, now will you just go through that and give us the total of the excess meals charged against Mr. Stephenson?

A. Total excess meals charged back was \$854.41.

Q. Just wait a minute; read that a little bit different. The excess meals, Mr. Baruth, without regard to your first entry there, just the excess meals for the period—let me see it—just give me the statement of the excess meals from March 13 through August 9, 1951. [294]

The Court: What is meant by excess meals, counselor?

Mr. Hughes: I will rephrase the question, your Honor.

The Court: I don't quite understand it; you mean excess charged for meals?

Mr. Hughes: Yes.

Q. What are those dates, Mr. Baruth—the first one there—March 9th, is it?

A. No; the first date here is February 17, 1951.

Q. The next one? A. March 13, 1951.

Q. And then the last date on the report?

A. August 9, 1951.



(Testimony of C. W. Baruth.)

Q. Now, just give us, Mr. Baruth, if you will, the total charged back to Mr. Stephenson as being in excess of \$10.00 per day for the period March 13 to August 9, 1951?

A. It would be \$854.41 minus the \$200.00 for February 17, or \$654.41.

Q. All right, now, by coincidence the figure that you arrived at squares with this figure that was given to Mr. Stephenson when Exhibit E was mailed out, isn't that right?

A. That's right.

Q. Now, then, Mr. Baruth, will you please tell me why you added \$200.00 onto that figure?

A. Yes, sir; by Mr. Stephenson's expense report for the period February 11, 1951, through February 17, 1951, there is reported, [295] under date of February 17, an expenditure for meals, \$200.00, Alaska Airlines dinner at LaBrie's, which is not supported by voucher or receipt.

Q. Now, let's call your attention to Exhibit E—the first item; isn't it a fact, Mr. Baruth, that you approved that expense?

A. No, sir.

Q. It is not?

A. No, sir.

Q. Well, then, what is the total of the vouchers for February 11 to 17 as shown by Exhibit A?

A. The total of the voucher is \$271.96.

Q. Does that include the \$200.00 to LaBrie's?

A. That includes the \$200.00.

Q. I see. Now, then, will you refer to Exhibit E and tell us how you allowed \$262.39 of that amount without getting the LaBrie's figure in there?

(Testimony of C. W. Baruth.)

A. Because I did not have, at that time, the expense report February 11 to February 17.

Q. Oh, so now Exhibit E is incorrect again, is that right?

A. No; we knew that the amount was there.

Q. And you listed it as allowable expense without supporting voucher, but now you wish to withdraw that, is that right?      A. No, sir.

Q. Now, just when did you prepare this Exhibit E?

A. It was some time in October, around the 15th or 16th or 17th— [296] somewhere in there; I know it was past the middle of the month.

Q. You prepared it around the 15th or 16th of October?      A. Somewhere around there.

Q. Why would you date it, then, September 19th?

A. This statement is not dated September 19th; it states, Audit Analysis of A. W. Stephenson's Expense Reports for period December, 1950, through September 1, 1951, Submitted on September 19, 1951, to Alaska Airlines' representative in Anchorage.

Q. All right; how in the world—you said you didn't have the vouchers—how in the world did you prepare it if you didn't have the vouchers?

A. We knew that the total was \$271.96.

Q. And you wrote it off as allowed, didn't you—\$262.39?

A. We didn't have proper support for it at the time.

(Testimony of C. W. Baruth.)

Q. You allowed it, didn't you? A. No, sir.

Q. Isn't it over in the Net Expense Allowable column? A. Yes, it is; \$262.39.

Q. Just what does Alaska Airlines mean when they say Net Expenses Allowed—when they put the expenses over in the allowed column, Mr. Baruth?

A. Without the totals in my possession at the time, I deducted \$9.57.

Q. You had everything that you've got now?

A. No, sir, I did not. [297]

Q. Didn't you have Mr. Stephenson's—

A. I had all the vouchers excepting the first one.

Q. Let me go back over this once more. Now, Mr. Baruth, you did say, did you not, that when you prepared Exhibit E you had the vouchers of Mr. Stephenson's submitted on September 19th?

A. Yes, sir.

Q. And I will ask you to look at this document and see if you didn't have everything recited in Plaintiff's Exhibit 10?

The Court: What is the document, counselor—exhibit what?

Mr. Hughes: No. 10.

Q. Did you not have all of that?

A. No; I had all the vouchers for March 11 through August 11, and the one for September 1.

Q. What is recited up there?

A. Recapitulation of Expense Statements Submitted on September 19, 1951, by A. W. Stephenson for the period from February 11, 1951, to and including August 11, 1951.

(Testimony of C. W. Baruth.)

Q. It is your statement that he didn't submit the vouchers, then, for February 11 to 17?

A. Mr. Stephenson did, but I didn't have that particular voucher.

Q. I see. Well, you are in the Auditing Department, aren't you, Mr. Baruth?

A. No, sir; I am in Treasury.

Q. You are in Treasury. Well, isn't that the normal place for [298] such statements to be?

A. That is correct.

Q. Weren't all of those papers in the hands of Alaska Airlines?

A. All but that first voucher.

Q. Who had it, Mr. Stephenson?

A. Mr. Marshall had it.

Q. Well, then, you prepared—where did Mr. Marshall have it?

A. He had it in his possession.

Q. Where? A. In Anchorage.

Q. Well, now, is it your practice to go through an employee's expense account and then later go back six months and pick it apart when he hasn't got the support, and say "These items are disallowed," and charge him for it?

A. There was nothing in support for that voucher.

Q. Why did you allow it, then?

A. I didn't allow it.

Q. Why is it in the last column on the page?

A. At that time, Mr. Hughes, I knew only that the amount was \$271.96, and there was \$9.57 in

(Testimony of C. W. Baruth.)

telephone and telegraph which was not explained, and I deducted that.

Q. You and Mr. Marshall had some conversation in regard to this particular expense?

A. Not until late in November or early in October.

Q. Did Mr. Marshall tell you to [299] disallow it?      A. Yes, sir.

Q. Well, then, you didn't disallow it; Mr. Marshall did, is that right?

A. He told me there was no support for it; I asked him several times for the voucher and he said "I have it and I will give it to you." When he gave it to me, I asked him where the support for the \$200.00 was and he said "I have been trying to ascertain whether it was a personal affair or a company affair" and he says, "To this day I have no satisfaction."

Q. Well, then, you didn't have any question on this at the time you made up Exhibit E, then?

A. I couldn't question it because I didn't have it to question.

Q. Well, did Mr. Marshall personally instruct you how to make this Exhibit E?      A. No, sir.

Q. Was that the only item he gave you instructions on?      A. Yes, sir.

Q. Well, then, what about the schedule that was attached here, didn't Mr. Marshall give you some instructions on that—the schedule that was originally attached to Exhibit E?

(Testimony of C. W. Baruth.)

A. \$856.63—is that the one you have reference to?

Q. Wasn't that in fact the product of Mr. Marshall's own hand?      A. Yes.

Q. Then he gave you some more assistance in this regard?

A. Well, with respect to meals, yes. [300]

Q. Now, you have talked considerably, Mr. Baruth, about the policy of the company in regards to these expense accounts; now, just what form did that policy take—was it written instructions?

A. No, sir; they were verbal instructions from Mr. Marshall.

Q. Mr. Marshall gave the Treasury Department verbal instructions, is that right?

A. Yes, sir; there were some policies written, and others were verbal.

Q. Well, do these policies vary from time to time?

A. No; with respect to meals, I had orders to disallow any item over \$10.00 a day for personal meals.

Q. Do instructions vary with the employees?

A. Naturally.

Q. Do the same instructions apply to Mr. Marshall as apply to Mr. Stephenson?

A. I wouldn't say so.

Q. Well there is, then, somebody that doesn't have to pay any attention to instructions in the company, is that right?

A. I don't know what you mean by that.

(Testimony of C. W. Baruth.)

Q. Well, there's someone that can do no wrong. Mr. Stephenson was General Manager, was he not? A. Yes.

Mr. Nesbett: Your Honor, I object to this line of questioning; it's a waste of time, it would seem to me. [301]

The Court: Overruled.

Q. Are there any written instructions in regard to expense accounts as they apply to the executives of the company?

A. That the expenditures must be supported by receipts, invoices, or receipted bills.

Q. Are those instructions written?

A. Yes, sir.

Q. And who put those out?

A. Those were with the company before I ever came with the company, Mr. Hughes.

Q. Have you got a copy of them with you?

A. No, sir, I haven't.

Q. And during the time you have been with the company have there been any instructions put out applicable to the officers of the corporation, and executives?

A. Well, I had instructions to disallow all meals of any officer in excess of \$10.00 a day, provided——

Q. Well——

Mr. Nesbett: Just a minute; let him answer the question, please.

The Court: Let the witness answer.

A. Provided that if he expended more than

(Testimony of C. W. Baruth.)

\$10.00 a day for meals he was to submit a list of persons whom he entertained at dinner, and if that was submitted, the expense, whatever it was, would be allowed. [302]

Q. Who gave that instruction?

A. Mr. Marshall.

Q. Is that in writing? A. No, sir.

Q. It wasn't general instructions, then, to employees?

A. All officials and executives knew about it.

Q. Well, were they all standing right there when it was said?

A. No, but the word was passed on.

Q. Passed on orally? A. Yes, sir.

Q. Who did you pass it on to?

A. I passed it on to Mr. Pierce, Mr. Sander-son, Mr. Henson, who was then vice president at Paine Field, Mr. Busy, director of engine overhaul, and Douglas Klein, in charge of line maintenance for the company.

Q. What was the date of those oral instructions that you passed on?

A. Way back in October or November, 1950, when I was first in the office.

Q. You don't remember, of course, the dates that you passed that on, do you?

A. No; not very well.

Q. Well, now, may I see Exhibit 7? As a matter of fact, Mr. Baruth, isn't Exhibit 7 the only instructions that were passed out by Mr. Marshall to the employees of the company during the [303]



(Testimony of C. W. Baruth.)

time you were employed there, in regard to expense accounts?

A. No, sir; this is a redraft of a memorandum which is dated October 22, 1945.

Q. What is the date of this communication?

A. January 5, 1951.

Q. Who redrafted it?

A. It was redrafted at Everett; I don't know who redrafted it, but it was put into effect on that date; there is a notice here at the top, "Memorandum to All Department Heads (copied from original memo dated on October 22, 1945—signed by Marshall C. Hoppin, president)."

Q. Will you please just read over again, now, the paragraph of Exhibit 7 in regards to expenses of employees?

A. "When detailed by the company away from home base on company business, actual expenses will be allowed for meals and hotels. Hotel receipts shall be obtained and submitted with expense vouchers."

Q. Well, now, that doesn't say anything about anything but the hotel, does it—hotel bills?

A. That's right; it specifically states hotels.

Q. So that, according to this instruction, why Mr. Stephenson's report would be accurate, is that right?

A. I wouldn't say so.

Q. Well, according to the language of it, it is, isn't it?

A. According to the language, yes. [304]

Q. Now, in regards to the telephone bills as

(Testimony of C. W. Baruth.)

shown on Exhibit E, Mr. Baruth, aren't those telephone bills supported by hotel bills at which Mr. Stephenson was staying at the time they were incurred?      A. Not all of them.

Q. Well, all right; which ones are not?

A. There is no explanation of who was called or whether it was company business or personal, or nothing submitted in any statement supplemental to the expense report by Mr. Stephenson.

Q. Well, now, let's just take the statement of March 31 to April 6—correction—the statement of April 7 to April 13, 1951; there's a telephone bill there in the amount of \$57.05; isn't that shown on the hotel bill?

A. It is merely shown as long distance, with no record as to who was called or whether it was company business or personal business.

Q. Well, it's shown on the hotel bill, anyway, isn't it, Mr. Baruth?      A. Right.

Q. All right; let's take the next one, \$29.72 for the period April 14 to April 20; isn't that shown on the hotel bill?

A. It is shown on the hotel bill, yes.

Q. Now, then, the telephone bill of April 21 to April 27, isn't that shown—there is an \$8.00 charge there—isn't that shown on the hotel bill? [305]

A. Yes; that is shown as long distance phone calls.

Q. And May 13 to May 19, \$22.78; isn't that shown on the hotel bill?

A. It is shown on the hotel bill, but no clarifica-

(Testimony of C. W. Baruth.)

tion is made as to whether it was personal business or company business.

Q. As a matter of fact, though, it complies with the instructions in Exhibit 7, doesn't it?

A. I think you will agree Exhibit 7 is rather loose.

Q. In any event, it complies, is that correct, sir?

A. Yes.

Q. As a matter of fact, all of these are shown on the hotel bills, aren't they, Mr. Baruth?

A. Not all of them.

Q. Can you think of one?

A. I would have to go through all of Exhibit A.

Q. I would like to have you find one that is not on a hotel bill, or supported by a voucher, some way.

A. Well, on the expense report for February 11, 1951, through February 17, 1951, there is an \$8.00 item under date of March 13th which is not on the hotel bill, and again on March 17, there is an item on the expense report for \$16.47 which is not on the hotel bill.

The Court: Court will stand in recess for ten minutes.

(Whereupon the court recessed from 3:02 o'clock p.m., until 3:12 o'clock, p.m., at which time the following proceedings were [306] had):

The Court: Without objection the record will show all members of the jury present. Counsel

(Testimony of C. W. Baruth.)

may proceed with examination of the witness.

Q. (By Mr. Hughes): Now, Mr. Baruth, your Exhibit E shows an item of hotel cash advanced, in the amount of \$563.00, is that correct, sir?

A. Yes, sir.

Q. Now, as an item of accounting, I believe you stated in your direct examination that didn't mean a thing, is that right?

A. That is correct, insofar as the ultimate result is concerned.

Q. Well, it is just the same as if you had—it has as much effect as if you would set up a list of items that were written in the typewriter and say \$500.00 of this was written in the typewriter and the rest of the account is written in pencil—it doesn't have any more effect on the account than that, does it?

A. In going through the expense vouchers I picked up these cash advances on hotel statements, and until I knew for sure they were not included in any expense account or any expense report, I left them in there, but when I had fully determined that these cash advances from the hotel were not added into or included in his expense report expenses, I credited those back to him in Adjustment No. 2.

Q. Well, then, the question I just asked you could be answered in [307] the affirmative without prejudicing your account, is that right?

A. That is correct, but I did not know they

(Testimony of C. W. Baruth.)

were not included until I had completed the entire examination.

Q. All right, now, then, the hotel bills as submitted, Mr. Baruth, are they all cancelled, or show a paid stamp on them?

A. There is one hotel bill which was not paid at the time Mr. Stephenson checked out of the hotel.

Q. Do you mean to say there's some of these hotels that are not paid now?

A. Not now——

Q. Well, they are in fact all taken care of, aren't they?      A. I presume they are.

Q. Aren't they all in fact marked paid?

A. I have found one here, Mr. Hughes, that isn't.

Q. While you are leafing through, will you determine if there's any more?

A. On May 7th, Mr. Stephenson had a check drawn, Union Bank Check No. 4549 was issued to the National Bank of Alaska for a bank draft payable to the Ambassador Hotel, New York, for an unpaid account dated April 18, 1951, in the amount of \$205.85, which would indicate to me that at the time Mr. Stephenson left the hotel he did not pay that bill of \$205.85, and that hotel bill was not paid until some time after May 7, 1951, when the hotel received the bank draft from the National Bank of Alaska. [308]

Q. Well, it likewise indicates, does it not, that the hotel bill was in fact paid?

A. Eventually, yes.

(Testimony of C. W. Baruth.)

Q. Well, now, that is just an inference of a delayed payment there that you want to make, but it doesn't in any way change the picture that the hotel bills have been paid, is that correct?

Mr. Nesbett: Your Honor, object to the tone of counsel's question; he asked him if they had all been paid and he said "No, they haven't; there's one that hasn't."

The Court: We are just wasting good time in debating whether a hotel bill was paid in February or May; they have all been paid according to the witness.

Q. I would like to have you look at that statement, Mr. Baruth; do you recognize that? You have identified that, have you not?

A. Yes, sir.

Q. And wasn't that exhibit——

Mr. Nesbett: What is it, Mr. Hughes?

Q. Wasn't Exhibit G attached to Exhibit E at the time the statement was submitted to Mr. Stephenson? A. Yes, sir.

Mr. Hughes: I would like to offer that as our exhibit, your Honor.

The Court: Well, you may put it in as your exhibit, although it would be easier, if it satisfies counsel, to set aside the [309] order striking it and leave it in as a Defendant's exhibit.

Mr. Hughes: I would request that the Court do it.

The Court: All right; the order striking Exhibit G is set aside and the exhibit is restored to

(Testimony of C. W. Baruth.)

the file and may be considered examined upon. You better state to the jury what Exhibit G is.

Mr. Baruth: A typewritten schedule of meals in excess of \$10.00 per day reported on Mr. A. W. Stephenson's expense reports from February 11, 1951, through September 1, 1951.

The Court: And that was the one based upon some kind of a computation or analysis made by Mr. Marshall, is that right?

Mr. Baruth: Yes, your Honor.

Mr. Nesbett: I don't see how it can be admissible now any more than when I offered it.

The Court: Well, if both parties wish it in, it may be in. I struck it out at the time because it was objected to by counsel for plaintiff, and I overruled his objection and admitted it upon the theory that it was Mr. Baruth's own production. When I found out he had accepted it from Mr. Marshall, clearly it was not eligible to go in over objection of counsel for plaintiff. Now that he wishes it to go in, all objection is removed, and I didn't know at that time a copy of that had accompanied Exhibit E when it was sent to Mr. Stephenson. If it was testified to, I overlooked it.

Q. Now, will you refer, please, to Exhibit G, and I will ask you, [310] Mr. Baruth, if the item listed there as May 2, 1951, in the amount of \$14.75 is not in fact the total expenses of Mr. Stephenson for the day of May 2, 1951, as shown by his expense account?

A. That is correct; \$14.75, meals.

(Testimony of C. W. Baruth.)

Q. And refer to the date of May 3, \$17.05, isn't that the entire amount of Mr. Stephenson's—

A. It is.

Q. And likewise, May 4, the item of \$29.20?

A. That is the amount, yes, sir.

Q. That is the entire meals that Mr. Stephenson had, is that correct?

A. That is correct, sir, and that is the reason why I prepared Exhibit H to correct Exhibit G.

Q. Well, doesn't it strike you as a coincidence that you would arrive at the same figure in your computation as in Exhibit G—

The Court: It is not the same, counselor.

Q. H—Exhibit H—isn't Exhibit H your computation? A. It is.

Q. And isn't that the same as the computation of Exhibit G, with the modification of \$2.22?

A. Correct.

Q. And the only difference being that you had to reach over here and get \$200.00 out of the allowed expenses in order to come [311] up with the same figure, isn't it, Mr. Baruth?

A. No; I took it off of Mr. Stephenson's reports under meals.

Q. Didn't you take that item from allowed expense, in the amount of \$200.00, and add to your Exhibit H in order to come up with the same figure Mr. Marshall had?

A. Exhibit H is a correction of Exhibit G, and I so testified. Exhibit H takes each individual day that Mr. Stephenson was in a travel status and



(Testimony of C. W. Baruth.)

lists his meals, including the \$200.00 which you refer to, which he claimed he spent on or about the 17th day of February, and was disallowed by me for the reason there was no support attached to the voucher.

Q. And it was likewise allowed by you at one time, is that true?

A. Inadvertently allowed.

Q. Yes. Now, Exhibit G, though, doesn't contain the \$200.00 figure that you set forth in Exhibit H—that is correct, isn't it, Mr. Baruth?

A. Exhibit G begins with March 11.

Q. Just one question, and answer it, if you will, yes or no; I asked you whether Exhibit G contains this \$200.00 figure that you used in your computation of Exhibit H?      A. No, it doesn't.

Mr. Hughes: That's all.

The Court: Is there any redirect examination?

Mr. Nesbett: Yes, your Honor. [312]

### Redirect Examination

By Mr. Nesbett:

Q. Mr. Hughes, I would like to have you look at this exhibit marked plaintiff's Exhibit 7 and read again the last paragraph.

Mr. Hughes: Did you say you would like to have me look at it?

Q. Mr. Baruth; I would like to have you look at it—

The Court: Do you wish to have it read aloud?

Mr. Nesbett: Yes.

(Testimony of C. W. Baruth.)

The Court: Read it aloud.

A. Under Expenses: "When detailed by the Company away from home base on Company business, actual expenses will be allowed for meals and hotels. Hotel receipts shall be obtained and submitted with expense vouchers."

Q. Now, what do those three words, "with expense vouchers" mean?

A. To total the expenditures contained in the reports.

Q. Then, if a person turned in a hotel bill with a \$25.00 telephone bill on it, would that satisfy the requirement of that rule?           A. No, sir.

Q. Why would it not?

A. Because there is no detail to support whether it is for company business or for his own personal pleasure.

Q. Now, in connection with the \$200.00 LaBrie's item, did you testify you did not have the particular information—voucher—on that alleged expenditure for Alaska Airlines employees? [313]

A. That is correct.

Q. Who had it?           A. Mr. R. W. Marshall.

Q. Why did he have it and not you?

A. Mr. Marshall was trying to ascertain whether or not it was company expense or personal expenses.

Q. Do you know whether or not he found out?

A. No, I don't.

Q. What did he tell you after his investigation?

A. He told me he could find no support for it.

(Testimony of C. W. Baruth.)

The Court: As a matter of human interest, where is LaBrie's?

Mr. Baruth: It is a restaurant in Anchorage, your Honor.

Q. You have read correspondence trying to determine whether that money was ever spent or not, haven't you?

A. I seem to recollect having read some correspondence on it.

Q. In connection with these airlines tickets, where the full amount of the fare was paid to Northwest Airlines and possibly other lines, if some explanation had been given to the Accounting Department as to why full fare was paid rather than full fare less 25%, would the full fare then have been allowed to Mr. Stephenson?

A. Yes, sir.

Q. Then what would it have taken to satisfy you?

A. A memorandum from Mr. Stephenson stating that the travel was extreme emergency and had to be consummated immediately, therefore it was necessary to pay full fare rather than wait [314] until approval for 25% reduction was obtained.

Q. Approval obtained from whom?

A. Northwest Airlines, or the line granting the 25%.

Q. Now, in those instances where full fare was charged, can you state that those were the instances in which Mr. Stephenson was travelling to New

(Testimony of C. W. Baruth.)

York to talk with Mr. Marshall about contract matters?

A. Yes; that is one of the occasions.

Q. This is Defendant's Exhibit F which I hand to Mr. Baruth. Now, since you testified in response to Mr. Hughes' questions concerning that exhibit, do you want to modify your original statement when you identified that piece of paper, or that exhibit, in connection with the \$1,331.51?

A. The only difference between this and the typewritten statement taken from the ledger card is that this statement contains the charges to Mr. Stephenson in a chronological date order; in other words, the December charges by reason of advance expense checks given to Mr. Stephenson, I have recorded here in December, 1950, rather than in February, 1951, when they were picked up on the books of the Accounts Receivable Department.

Q. Do you still believe that is a true reflection of the expenses submitted by Mr. Stephenson compared to the cash advances received by him?

A. Yes, sir. [315]

Mr. Nesbett: That is all, your Honor.

The Court: Have the jurors any questions to ask this witness? That is all, Mr. Baruth; you may step down; another witness may be called.

Mr. Nesbett: Call Mr. Marshall. [316]

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No. 13494

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IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

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ALASKA AIRLINES, INC., a Corporation,  
*Appellant,*

vs.

ARTHUR W. STEPHENSON,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA—THIRD DIVISION

---

**BRIEF FOR APPELLANT**

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No. 13494

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IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ALASKA AIRLINES, INC., a Corporation,  
*Appellant,*

vs.

ARTHUR W. STEPHENSON,  
*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA—THIRD DIVISION

## BRIEF FOR APPELLANT

### Pleadings and Jurisdiction.

This is an appeal from a judgment entered on April 18, 1952, upon verdicts in favor of plaintiff, awarding him \$11,050 on his first claim, and \$2,695 on his second claim, with costs and attorneys' fees allowed by the Court (\*73-75).

The cause was within the general jurisdiction of the Alaska District Court (48 USC, § 101, Alaska Compiled Laws Ann. 1949, § 53-1-1). Jurisdiction of this Court to review the judgment of the District Court is conferred by 28 USC, §§ 1291 and 1294.

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\*References are to pages of the record unless otherwise indicated.

Appellee, as plaintiff, alleged in his first claim that he entered defendant's employ on September 22, 1950, at a wage of \$1300 a month (3), taking a six-months' leave of absence from Western Airlines, Inc., to do so, said leave to expire on March 18, 1951; that prior to expiration of his leave, defendant, by the Chairman of its Board of Directors, R. W. Marshall, promised plaintiff a contract with defendant corporation for a period of not less than two years from March 15, 1951 to March 15, 1953, at a monthly salary of \$1300 plus expenses while away from home; that plaintiff severed his connections with Western Airlines, Inc., at the request of defendant's Chairman, thereby losing rights of pay and tenure with that company (4-5); that plaintiff was discharged by defendant on September 15, 1951; that by reason of defendant's failure to complete its contract of employment, plaintiff was damaged in the sum of \$22,100 (6-7).

In his second claim, plaintiff asked for \$3,092.87 for travel expenses, wages unpaid, moving expenses and other costs alleged to have been incurred at the request of the Chairman of the Board (6).

In its answer, defendant admitted employing plaintiff, but at a salary of \$1,000 a month plus traveling expenses, plus an additional sum of \$300 per month until such time as plaintiff could move his family to Alaska (10); denied making a promise of a contract of employment for a fixed term, and alleged that on two separate occasions plaintiff, on his own initiative, traveled to New York from Alaska where he conferred with the Chairman of the Board, requested a contract of employment, and on each occasion, was refused (11).

Defendant denied plaintiff's second claim (12), and counterclaimed for \$2,174.15 for funds wrongfully withdrawn by plaintiff while an officer of defendant (13-14). Defendant, by way of affirmative defense to both claims, pleaded the Statute of Frauds (12-13).

Plaintiff replied denying the counterclaim (14-15).

At the close of plaintiff's case, defendant moved for an instructed verdict, which was denied (30-31). The motion was renewed and denied at the close of the entire case (296).

At the close of the case defendant was permitted to plead additional affirmative defenses of (1) justifiable discharge based on plaintiff's refusal to account for corporate funds withdrawn by him, and (2) plaintiff's failure to attempt to find other employment so as to mitigate damages (36).

A motion for judgment notwithstanding the verdict was denied (69-71). Defendant's motion for a new trial (77-79) was denied (85-86).

### **Statement of the Case.**

In New York, in September of 1950, plaintiff was employed by Raymond W. Marshall, the Chairman of the Board of Directors of defendant, to act as General Manager of Alaska Airlines (121-2). The employment was admittedly on a month to month basis (122, 226). Plaintiff claims the salary was to be \$1300 a month, plus traveling expenses, plus "additional expenses" connected with living in Alaska (122-124). Defendant claims the salary was to be \$1000 a month, plus traveling expenses, plus an additional sum of \$300 a month for only as long as plaintiff was required to maintain his home in Los Angeles (226).

Plaintiff was employed as a pilot by Western Airlines Inc., but obtained a six-months' leave of absence to accept employment with defendant (122).

Plaintiff entered upon his duties, and next met Marshall in New York about January 6, 1951 (126), at which time, plaintiff testifies, Marshall told him he could move his family to Alaska and defendant would pay all expenses (128). Plaintiff moved his family to Alaska (128).

Commencing in February of 1951 (158), plaintiff failed to submit regular expense vouchers in accordance with company practice. Plaintiff says he refused to submit the vouchers because defendant's accounting department failed to give him regular notice of credits approved on vouchers submitted prior to February, 1951 (158).

Plaintiff was discharged by defendant in August of 1951 (144). On September 19, 1951, plaintiff delivered to defendant a number of vouchers for the period from February to August (176), but did not submit vouchers in support of his claim for "moving and additional expense" (169). At the trial, it appeared that these "moving and additional expenses" for which company funds had been withdrawn covered such expense items as pay for a caretaker for his Los Angeles home, winter clothing for his family and, in particular, the sum of \$2000 to make monthly payments on a home he had purchased in Anchorage (180-181, 184). Defendant contends that moneys expended for the purchase of a home (217) are not "moving expenses", even assuming that defendant did agree to pay such expenses.

Plaintiff's leave of absence with Western Airlines, Inc., expired on March 18, 1951 (129). On or about March 15, 1951, plaintiff traveled to New York from Alaska for the purpose of negotiating a contract of employment with defendant for a definite period (128). Plaintiff now contends that he succeeded in getting a promise from Marshall that defendant would employ plaintiff for two years at a salary of at least \$1300 per month and execute a contract to that effect at a later date (130-131). Marshall testified that no promise of a contract for a definite salary for a definite period of time could or would be given until it was learned whether defendant would receive a certificated route from the Civil Aeronautics Board and, if so, what the route would be (227). Plaintiff allowed his leave with Western Airlines to expire (134) and claims to have

lost longevity rights and other valuable tenure advantages.

On or about April 7, 1951, plaintiff again went to New York and presented to Marshall a proposed employment contract in writing (137-140), this proposed contract being sharply at variance with the contract he claims to have been orally promised on March 16th or 17th, three weeks earlier. After ten days in New York, plaintiff returned to his duties (141). Admittedly, no written contract was signed or agreed upon during the April visit (141-2).

Defendant received a certificated route on May 24 or 25, 1951 (136), but plaintiff made no attempt to obtain a written contract (137).

Defendant terminated plaintiff's services on August 23, 1951 (144). Plaintiff was retained on the payroll, however, until October 15, 1951 (145, 335-6).

Plaintiff sues upon an alleged oral promise to execute a written contract for employment by defendant for a period of two years at a monthly salary of \$1300 and, in a second claim, for wages and expense moneys due.

Plaintiff relies upon the doctrine of "promissory estoppel" to avoid the effect of the Statute of Frauds on the alleged oral promise.

## **Specification of Errors.**

### **First Claim.**

1. The evidence is insufficient to establish a contract between the parties, written or oral.

2. The alleged contract was within the Statute of Frauds, and defendant is not estopped to assert its invalidity upon that ground.

3. The evidence establishes that plaintiff had made no effort to mitigate damages and, therefore, any recovery for other than nominal damages was improper.

4. The verdict is contrary to the law and the evidence.

5. The trial court erred in denying defendant's motion for a directed verdict in favor of defendant as made at the close of plaintiff's case and as renewed at the close of all the evidence.

6. The trial court erred in denying defendant's motion for judgment notwithstanding the verdict.

### **Second Claim.**

1. Plaintiff failed to establish a contract with the defendant to reimburse him for installments paid in the purchase of real property in Anchorage, Alaska, in the aggregate amount of \$2,000.00.

### **POINT I.**

**There was insufficient evidence to go to the jury that defendant had entered into an oral contract with plaintiff to employ him for two years.**

Plaintiff's first claim is based upon conversations had with Raymond W. Marshall, Chairman of defendant's Board of Directors (225). Plaintiff's evidence is his own unsupported testimony as to interviews with Marshall. His evidence is contradicted by Marshall in material respects (225-240). Since it must be presumed that the jury by its verdict preferred plaintiff's version to Marshall's, the latter's testimony will be disregarded and this point will deal only with the question whether plaintiff upon his own testimony established an oral contract.

Plaintiff testified as to four interviews with Marshall at defendant's office at 501 Fifth Avenue, New York, N. Y. On the first of these, on September 19, 1950, plaintiff says that he was employed at \$1300 a month. While a contract



and increased salary were discussed, these matters were deferred. Presumably, the employment was from month to month (121-126). The next interview was on January 6, 1951. Plaintiff concedes that at its conclusion he had no agreement (127-128). The next interview was on March 16 or 17, 1951, or both. Plaintiff's 180-day leave from Western Airlines, by which he previously had been employed, was to expire on March 18th (129-134). It is plaintiff's contention that on this occasion an oral agreement was made for two years at his current salary of \$1300 a month. A fourth interview or series of interviews was had between April 7 and 17, 1951 (137-144). Plaintiff admits that at these conferences he submitted a proposed contract in writing by which he sought to obtain better terms. Marshall refused to sign it.

On May 24, 1951, the Civil Aeronautics Board granted defendant a Certificate of Public Convenience and Necessity to operate a route from Portland and Seattle to Fairbanks (136). Prior to this grant of authority, defendant had been authorized to operate a scheduled service only between Alaska points. At all of the interviews with Marshall, the granting of this Certificate hung in the balance (123, 125, 126, 127, 128, 130, 131, 133, 134 and 142). Manifestly, the Certificate would effect a great change in the scope of defendant's operations and, therefore, in its permissible budget. At all four of the interviews the Certificate was mentioned as a critical factor determining plaintiff's future with defendant. The extent of the operation permitted by the Certificate, and the life of the Certificate itself, could not be known in advance. Defendant maintains that Marshall did not commit the company to a fixed-term employment contract, and was unwilling to do so unless and until a Certificate was granted, and the extent and terms thereof known; plaintiff contends that the granting of the Certificate was merely to be the occasion for reducing to writing an oral agreement for such a fixed-term contract made on March 16 or 17, 1951.

Plaintiff's assertion of an oral contract in March is highly improbable. On plaintiff's own testimony, Marshall had refused a written contract in September (122), had refused it in January (127), refused it in March when the oral contract is alleged to have been made (130), and refused it again in April (142). All of these refusals were upon the ground that the Certificate of Public Convenience and Necessity had not yet come down (122, 127, 130, 142). It is clear that in the minds of the parties the written contract and the fixed-term contract were equivalents. In view of the importance which the granting of the Certificate played in the negotiations, it is fatuous to suppose that Marshall in March was willing to commit the company to a two-year contract, and was merely unwilling to put the contract in writing until the Certificate was granted. Such an intention cannot be attributed to Marshall unless, indeed, he made the oral promise with tongue in cheek and the statute of frauds in mind. There is no such contention and no evidence upon which such a contention could be based.

The improbability reaches absurdity when the admitted fact is added that in April, less than three weeks after the oral agreement is alleged to have been made, plaintiff was back in New York presenting a written contract, not for two years, but for four, and not at \$1300 a month, but at \$18,000 a year (\$1500 a month), to be increased to \$23,000 when the certificate was granted, and that Marshall refused again to enter into a written contract (137-142). And further to cap the climax, when on May 24, 1951, the Certificate was granted, and thus the event had occurred upon which, according to plaintiff, the contract was to be reduced to writing, plaintiff did not renew his request for a formal contract (137) and never made any attempts to obtain one thereafter (143).

Not only is a March oral contract highly improbable, but the closest scrutiny of plaintiff's own testimony fails

to reveal any meeting of the minds. Plaintiff testified on direct examination (128-130):

“Q. All right, then; you removed your family to Alaska following January 6, 1951. Now, then, when was it that you next discussed the contract with Mr. Marshall or any officer of Alaska Airlines?

A. It was, I believe, the 16th of March. 16th or 17th—possibly both days.

Q. The 16th day of March of 1951, is that correct?

A. Yes; that’s correct.

Q. Well, now, will you state the occasion for your discussion at that time?

A. I advised Mr. Marshall that my last day of leave was the 17th of March and that I would have to report to Western Airlines in person on the 18th or my employment with Western would be terminated.

Q. Now, where did this discussion take place?

A. In Mr. Marshall’s office in New York.

Q. And who else was present?

A. There was no one else present.

Q. Well, did you advise Mr. Marshall anything further than that—was that the full text of your advice to him in this regard?

A. I believe so.

Q. Do you recall, is that substantially the language you used?

(Omitting irrelevant comment.)

A. And that I thought we should consummate and complete some sort of an agreement.

Q. What did Mr. Marshall tell you on this occasion?

A. I indicated to him that I thought I should have a contract for four years and that the increase in salary could be contingent upon the date we started operating from Alaska to Seattle.

Q. Did Mr. Marshall agree to that point, or what did he say?

A. He agreed that it was time a contract should be written but he was reluctant to do so until the certificate was issued.”

No contract can be read into this conversation. Plaintiff has "some sort of an agreement" in mind, but defendant's officer is reluctant to enter into a contract until a certificate is issued.

Still on direct examination, plaintiff testified (131-133):

"A. My principal concern at that time, and I expressed it to Mr. Marshall, was that I must be back in Los Angeles on the 18th or forfeit my rights with Western Airlines, and I remember once telling him that I better make up my mind—we better make up our minds—where I was going tomorrow; whether I was going to Anchorage or Los Angeles, and he again assured me—he said 'Let's go along and we'll get a contract worked up when we get this certificate.' We discussed many items, minor items of operation in Seattle and Anchorage, and intermittently interspersed our conversation with discussions about a long term agreement with me.

Q. Now, did you at that time offer a memorandum agreement to Mr. Marshall?

A. I offered him a memorandum of—it wasn't in agreement form; it was simply four or five paragraphs stating the things that I thought should be incorporated into an agreement.

Q. Do you have that instrument with you?

A. No, I do not.

Q. Do you know what happened to it?

A. I left a copy of it with Mr. Marshall and my copy I have lost or misplaced somewhere.

Q. Well, do you recall the text of the memorandum?

A. The text of the memorandum pertained—one or two paragraphs pertained to the method of operation, the division of responsibility, and the assignment of functions to the Alaska office of Alaska Airlines—to their Anchorage Office—and I had stated in my memorandum that I thought there should be a four year written agreement and I did not press the salary increase at that time until a certificate—an increase in salary when the certificate was granted.

Q. Did you set forth a salary in your memorandum?

A. Yes; I asked that I be at least paid \$18,000.00 a year over the \$15,300.00 that I was being paid.

Q. I didn't understand that; would you just repeat that again?

A. I insisted that it be that much of an increase when the certificate was issued.

Q. The difference between what figures?

A. Fifteen three and eighteen thousand.

Q. Is that the figure that you were being paid, at the first figure, fifteen three?

A. That's right.

Q. Well, now, do you recall Mr. Marshall's statements in regard to this instrument when you delivered it to him?

A. His statement was that he didn't—that now wasn't the time to complete an agreement; we would still wait until we got the certificate and knew what we had, what size the operation would be, where I might live. The thinking was that if we got a certificate to the States we could operate out of Seattle rather than Anchorage."

Still no promise to contract on definite terms. No term was mentioned by plaintiff, and there is question as to what salary he wanted. But there is no doubt as to Marshall's attitude that "now wasn't the time to complete an agreement; we would still wait until we got the Certificate and knew what we had."

Again on direct examination (134):

"Q. Well, what did Mr. Marshall advise you to do, if anything?

A. He advised me to go on back to Anchorage and when we get this certificate and get squared away, why, we will make a satisfactory agreement."

By plaintiff's own testimony Marshall would not make a promise, other than to make a "satisfactory agreement" when the certificate issued and they have squared away.

Moreover, an analysis of plaintiff's testimony shows that in the critical interview of March 16th or 17th, as reported by him, the essential elements of a contract were not present.

**(1) Duration of the employment.**

Following is all of the testimony as to the period of the contract (130):

“Q. Well, did Mr. Marshall make any representations to you as to what the agreement was going to be?

A. Well, my idea of it was that it should be for four years and he thought that would be a little too long, or too long, and that possibly two years would be agreeable, but that he didn't want to do that until the certificate was issued.

Q. Well, did you agree on two years?

A. Yes; it would have been satisfactory to me at that time to have done it that way.

Q. Well, did the two of you agree on a contract at that time, or a term?

A. I conceded that point to him.”

At that interview, plaintiff presented a memorandum of matters that he wished incorporated into a written agreement. The period of employment was put down as four years, not two, and the salary at \$18,000, not \$1,300 a month or \$15,600 (132). Plaintiff testified (133):

“Q. Well, did Mr. Marshall take issue with your memorandum agreement as to salary?

A. No, he did not.

Q. Did he take issue with it as to time, duration?

A: He suggested—indicated that two years would be a much better arrangement for him, he thought, than four.”

It is clear that with reference to the period of employment, as well as to the amount of salary, Marshall was speaking of what might be done after the Certificate was

granted, and was not referring to a contract presently binding.

**(2) Date when the period of employment was to commence.**

Despite the fact that all of the conversation appears to have been prospective and to have been related to what might be done after the certificate was granted, plaintiff's theory forces him to the position that the two years was to commence immediately and so alleges in his complaint (5-6). There was no evidence as to when the fixed period of employment should commence.

**(3) Amount of salary.**

The memorandum which plaintiff presented at the March meeting called for \$18,000 (132). Plaintiff testified on cross-examination (276):

“Q. Is it your testimony that you two agreed at that time that you were to be employed for two years at \$1,300.00 per month?

A. That was the salary at that time and there was no particular argument about changing the salary until we got a certificate.”

**(4) Consideration.**

There was no consideration for defendant's alleged agreement to employ plaintiff for two years unless it was plaintiff's reciprocal promise to work for defendant for **two years**. Indeed, the Court charged that the verdict upon this claim must be for defendant unless the jury found “that the plaintiff at the same time promised to work for the defendant for the period of two years and for a minimum salary of \$1,300.00 a month, which might be increased by agreement of the parties after the issuance of the desired certificate to the defendant” (310).

There was no evidence whatever upon which the jury could have so found. Plaintiff nowhere testified that he,

in March or any other time, had committed himself to work for defendant for two years or for any period, and certainly nowhere that he had agreed to work for \$1300 a month after the Certificate was issued. The jury could not have inferred such a promise from thin air. Indeed, such an inference is hardly permissible in view of the fact that when in April, only three weeks later, plaintiff submitted to Marshall a formal written contract which he had had prepared and to which he asked Marshall's signature, there was no provision whereby plaintiff bound himself for two years or four years or for any period (138-140).

Thus, neither as to term of employment, salary or consideration is plaintiff's version of the March conversation sufficiently definite to constitute an enforceable contract. The lack of these essential elements in plaintiff's own testimony, plus the improbability that Marshall intended to or did commit the company to a fixed-term high-salary contract prior to the granting of the Certificate of Public Convenience and Necessity, are so strongly indicative that there was no such contract that the Court erred in submitting the question to the jury.

## POINT II.

**The alleged contract was within the Statute of Frauds and defendant is not estopped to assert its invalidity upon that ground.**

**A. The applicable law is that of New York where the contract was made.**

Plaintiff alleges that defendant did "promise this plaintiff a contract with the Alaska Airlines, Inc. for a period of not less than two years from March 15, 1951 to March 15, 1953, \* \* \*" (4-5).

The contract was one which by its terms was not to be performed within one year from the making thereof. Hence,



the contract was invalid whether the applicable law was Alaska statutes § 58-2-2, or § 31 of the New York Personal Property Law, the provisions being substantially identical.

The Conflict of Laws Restatement provides:

“§ 334. Formalities for Contracting.

The law of the place of contracting determines the formalities required for making a contract.

Comment:

a. The law of the place of contracting determines whether the contract must be in writing in order to be valid.”

The conference between plaintiff and Marshall on March 16 or 17, 1951, at which the oral contract is alleged to have been reached, took place at 501 Fifth Avenue, in the Borough of Manhattan, City of New York, as, indeed, did all of the other conferences relating to plaintiff's employment. Hence, New York was the place of contracting and New York law applies.

The New York Personal Property Law provides:

“§ 31. Agreements required to be in writing

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime; \* \* \* ”

**B. Under New York law, an oral agreement to enter into a subsequent written agreement is within the statute.**

In *Newkirk v. Bradley & Son* (4th Dept. 1947), 271 App. Div. 658, 67 N. Y. S. 2d 459, 461, the Court said, per LARKIN, J. (p. 660):

“We are not impressed by plaintiff’s argument that, since defendant’s promise was to execute a written contract granting him the exclusive sales agency, thereby a completed contract breached by defendant is pleaded. On the contrary, we conclude that defendant’s alleged promise to reduce this agency contract to writing adds nothing to the enforceability of the agreement (*McLachlin v. Village of Whitehall*, 114 App. Div 315, 99 N. Y. S. 721; *McLachlin v. Village of Whitehall*, 121 App. Div. 903, affd. 194 N. Y. 578, 88 N. E. 1124; *Deutsch v. Textile Waste Merchandising Co.*, 212 App. Div. 681, 684, 209 N. Y. S. 388; *Theiss v. McRae*, 260 App. Div. 882, 23 N. Y. S. 2d 2; *Subirana v. Munds*, 282 N. Y. 726, 26 N. E. 2d 828; 2 Williston on Contracts [Rev. ed.], § 524A, p. 1512; Browne on Statute of Frauds [5th ed.], § 284, p. 376).”

**C. Under New York law, the defendant in this case cannot be estopped from asserting the defense of the Statute of Frauds.**

Promissory estoppel has not been recognized in New York, save as a substitute for consideration in agreements to make charitable contributions. Except in this limited area, it is essential to estoppel that there be a representation of existing fact and a reliance by the other party to his detriment upon that representation.

*Kahn v. Cecelia Co.* (S. D. N. Y. 1941), 40 F. Supp. 878, arose upon a motion to dismiss the complaint for failure to state a claim. The Court, COXE, D. J. said (pp. 879-880):

“The sole ground urged by the plaintiff to sustain the first cause of action is that the defendant is estopped to interpose the Statute of Frauds as a defense. Personal Property Law N. Y. § 31. This is a clear recognition that the cause of action cannot stand if the allegations in support of the estoppel are insufficient. These allegations are criticised by the defendant as mere conclusions. I prefer, however, not to take that ground, as I do not believe that

'promissory estoppel', on which the plaintiff relies, has any application to the case under New York law.

"The doctrine of 'promissory estoppel' is of comparatively recent origin, and has usually been resorted to as a substitute for consideration. Williston on Contracts, Rev. Ed., § 139; Restatement of Contracts, § 90; *Porter v. Commissioner of Internal Revenue*, 2 Cir., 60 F. 2d 673, 675. In New York it has received a limited application 'as the equivalent of consideration' in cases involving charitable subscriptions. *Allegheny College v. National Chataqua County Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173, 175, 57 A. L. R. 980. The doctrine has been extended in some jurisdictions to cases similar to the one at bar. Williston on Contracts, Rev. Ed., § 533-A; Restatement of Contracts, § 178, comment (f). But this extension has found no support in New York. *White v. Ashton*, 51 N. Y. 280.

"The case is not unlike *McLachlin v. Village of Whitehall*, 114 App. Div. 315, 99 N. Y. S. 721, even though the form of the action is different. In that case there was a strong showing that the plaintiff had made a large outlay in reliance on an oral promise of the defendant to enter into a written contract, yet the court held that there could be no recovery. It is true that the action was for breach of the oral promise, but I do not believe that the result would have been otherwise even if the action had taken the present form. The real basis for the decision was that the court was not willing to permit the 'practical nullification of the statute of frauds' (p. 318 of 114 App. Div., p. 723 of 99 N. Y. S.). A similar ruling was made in *Deutsch v. Textile Waste Merchandising Co.*, 212 App. Div. 681, 209 N. Y. S. 388."

In New York only a representation of fact will support an estoppel. A mere promise will not do so. In *White v. Ashton* (1873), 51 N. Y. 280, defendants' bill of lading did not specify the route which the schooner was to take. Plaintiff claimed that defendants had promised him that the

vessel would take the inside route and, in reliance thereon, he had insured his shipment of barley for that route. The vessel took another route, the shipment was lost, and plaintiff's insurance was not available. The Court held that the parole evidence rule applied, and that defendants could not be estopped to assert that the alleged promise to take the insured route was not part of the written contract. The Court denied a recovery and said, per HUNT, C. (p. 285):

“Here was a promise simply to do a given thing, allowing the utmost force to the evidence and the offers, to wit, to transport the goods by the inner route. There was no assertion of an existing fact, the truth of which the party now wishes to disprove. He failed to perform his verbal agreement. Is there any case which, upon the principle of estoppel, will prohibit his taking advantage of the rule that this agreement was merged in the writing?”

In *Newkirk v. Bradley & Son* (4th Dept. 1947), 271 App. Div. 658, 67 N. Y. S. 2d 459, 462, the Court said, per LARKIN, J. (p. 660):

“We do not believe that the rule expressed in Restatement of Contracts (§ 178, comment f, p. 235) that an estoppel may arise to preclude the plea of the statute because of plaintiff's reliance on defendant's promise to give him a written agency contract, is applicable. Even though defendant's refusal so to perform may be unconscionable and may result in injury to plaintiff, still a mere refusal to perform, in the absence of fraud, seems not enough, in New York, to justify disregarding the statute (*Bulkley v. Shaw*, 289 N. Y. 133, 139, 44 N. E. 2d 398; *Kahn v. Cecelia Co.*, 40 F. Supp. 878).”

The Court below recognized that the *lex loci contractus* rule should be applied in the instant case (204), but considered that it could not rule out the doctrine of promissory estoppel because “neither the Appellate Division of the Supreme Court of New York nor the Court of Appeals of

New York has ruled directly upon the exact problem with which we are confronted here" (205).

However, the New York cases which have dealt with partial performance by plaintiff as a ground for denying the application of the statute of frauds, give a clear answer so far as the New York Court of Appeals is concerned. All of these cases of partial performance include the element of steps taken to plaintiff's disadvantage in alleged reliance on the oral promise. Uniformly these cases require, not only that plaintiff's acts in reliance on the oral promise shall have been to his damage, but also that those acts shall themselves evidence the oral promise. As far back as *Phillips v. Thompson* (1814), 1 John. Ch. 131, Chancellor KENT said (p. 149):

"It is not sufficient that the entry and use of the land is evidence of some agreement. It must be satisfactory evidence of the particular agreement charged, or it will not take the case out of the statute."

There is a view that the avoidance of the statute by a partial performance should logically be grounded upon estoppel, and not upon the proposition that the partial performance is corroborative evidence of the oral contract. 75 A. L. R. 651, Note. However this may be, it is nevertheless clear that in New York the partial performance that will take the case out of the statute must be "solely and unequivocally referable" to the contract.

As was said by COLLIN, J., in *Woolley v. Stewart* (1918), 222 N. Y. 347, 351, 118 N. E. 847, 848:

"The acts must, however, be so clear, certain, and definite in their object and design as to refer to a complete and perfect agreement of which they are a part execution—must be unequivocal in their character and must have reference to the carrying out of the agreement."

In the recent case of *Roberts v. Fulmer* (1950), 301 N. Y. 277, 93 N. E. 2d 846, 849, a suit for the specific performance of an oral agreement to convey a farm, plaintiff had surrendered a factory job and, with his wife and children moved to the farm and proceeded to work it, making a contract for the re-siding of the farmhouse at a cost of \$800, payable in thirty-six monthly installments. Since, as the prevailing opinion states (p. 281), the parties and the Courts below agreed on what the law was, but differed only as to its application, we take the restatement of the law from the dissenting opinion because it is somewhat more full (p. 285):

“Fuld, J. (dissenting). I start with the premise—for we are all agreed on the proposition—that not every act of part performance is sufficient to take an oral contract for the sale of real property out of the statute of frauds (Real Property Law, § 259). If equity is to enforce such an oral agreement, it requires assurance, positive and unequivocal, from the acts performed, that ‘The peril of perjury and error \* \* \* latent in the spoken promise’ is avoided. (*Burns v. McCormick*, 233 N. Y. 230, 234, 135 N. E. 273, 274.) Accordingly, the principle is firmly established that part performance ‘must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done.’ (*Burns v. McCormick*, *supra*, 233 N. Y., at p. 232, 135 N. E. 273.) In other words, part performance, alone and without relation to the oral promise, must be ‘solely and unequivocally referable’ to an agreement of purchase and sale, ‘unintelligible or at least extraordinary unless as an incident of ownership’; if it is not, the promise may not be enforced. (See *Neverman v. Neverman*, 254 N. Y. 496, 500, 173 N. E. 838, 839; *Burns v. McCormick*, *supra*, 233 N. Y. 230, 232, 234-235, 135 N. E. 273, 274; *Woolley v. Stewart*, 222 N. Y. 347, 351, 118 N. E. 847, 848.)”

By a four to three vote the Court of Appeals held (p. 284):

“When viewed against the whole record, then, we hold that the acts and conduct of the plaintiff constituted part performance ‘solely and unequivocally referable’ to the contract within our established rule (*Woolley v. Stewart, supra; Burns v. McCormick, supra*, p. 234; *Neverman v. Neverman, supra*; Real Property Law, § 270).”

Clearly, it is not necessary to go further than this case to determine how the New York Court of Appeals would decide the instant case. If all that was necessary to avoid the operation of the statute of frauds was for plaintiff to have relinquished rights or suffered prejudice in reliance on the oral promise, the case of *Roberts v. Fulmer* could have been decided upon that ground, and decided unanimously, without inquiry whether the acts and conduct of the plaintiff constituted part performance “solely and unequivocally referable to the contract.”

Furthermore, the doctrine of partial performance, even to the limited extent that the New York Court of Appeals accepts it, has been confined to cases where the oral contract is invalid under § 259 of the Real Property Law, relating to sales of real property. Under that section the Statute of Frauds is unavailable as a defense if plaintiff has partially performed the contract and that performance is “solely and unequivocally referable to the contract.” *Woolley v. Stewart* (1918), 222 N. Y. 347, 118 N. E. 847; *Burns v. McCormick* (1922), 233 N. Y. 230, 135 N. E. 273; *Neverman v. Neverman* (1930), 254 N. Y. 496, 173 N. E. 838; *Roberts v. Fulmer* (1950), 301 N. Y. 277, 93 N. E. 2d 846. *Wikiosco, Inc. v. Proller* (3d Dept. 1949), 276 App. Div. 239, 94 N. Y. S. 2d 645, while it uses the language of estoppel, arose under § 259, and was a case of complete performance on the part of plaintiff.

On the contrary, in the case of § 31 of the Personal Property Law, a contract not to be performed within the year, partial performance will not serve. Nothing short of

full performance by both parties will take such a contract out of the operation of the statute. *Bayreuther v. Reinisch* (1st Dept. 1942), 264 App. Div. 138, 34 N. Y. S. 2d 674, aff'd 290 N. Y. 553, 47 N. E. 2d 959; *Wahl v. Barnum* (1889), 116 N. Y. 87, 98, 22 N. E. 280; *Tyler v. Windels* (1st Dept. 1919), 186 App. Div. 698, 174 N. Y. S. 762, aff'd (1919), 227 N. Y. 589, 125 N. E. 926; *Deutsch v. Textile Waste Merchandising Co.* (1st Dept. 1925), 212 App. Div. 681, 209 N. Y. S. 388.

Thus, in *McLachlin v. Village of Whitehall* (3d Dept. 1906), 114 App. Div. 315, 99 N. Y. S. 721, the Court reversed a judgment upon a jury's verdict and denied recovery upon an oral agreement to enter into a written contract to light the village for five years, although plaintiff claimed that in pursuance of the oral agreement made with the village trustees he had expended \$8,000 to \$10,000 in installing an incandescent lighting system.

In *Deutsch v. Textile Waste Merchandising Co.* (1st Dept. 1925), 212 App. Div. 681, 209 N. Y. S. 388, the Court upon affidavits dismissed a complaint in a case in which defendant claimed an oral contract to give plaintiff a written contract of employment for five years. This was done although the complaint alleged that plaintiff, relying on defendant's promise, had given defendant the benefit of all of his trade secrets, a large volume of business and had lost the opportunity of making other connections in the trade.

It is clear, therefore, that, however viewed, the New York Statute of Frauds is a bar to plaintiff's recovery.

**D. Even if the doctrine of promissory estoppel applies, plaintiff has not brought himself within it.**

Manifestly, to permit recovery upon an oral agreement upon any ground is to deprive defendant of the protection intended by the statute. As was said in *Kroger v. Baur* (2d Dist. 1941), 46 Cal. App. 2d 801, 117 P. 2d 50, 52:

“Without the protection of the statute, the defendant is called upon to meet the bald assertion of a promise



to which he can interpose nothing but his simple denial.”

Therefore, even in those cases in which it has been recognized that plaintiff may enforce an oral promise because defendant is estopped to assert the statute, the Courts have proceeded with great caution. In *Albany Peanut Co. v. Euclid Candy Co.* (1st Dist. 1938), 30 Cal. App. 2d 35, 38, 85 P. 2d 471, 472, the Court said:

“Before such an estoppel can arise the essential terms of the contract must be shown with reasonable certainty, and that representations were made by the opposite party that the invalidity of the contract under the statute would not be asserted, together with the fact that the party urging the estoppel has, pursuant to the terms of the contract, and induced by the representations and in reliance thereupon, changed his position to his detriment, the intention to make such change being known at the time to the one making the representations.

“The circumstances must clearly indicate that it would be a fraud for the party offering the inducements to assert the invalidity of the contract under the statute, and, unless the words and conduct of the party sought to be held amount to an inducement to the other to waive a written contract in reliance upon the representation that the person promising will not avail himself of the statute of frauds, there is an absence of fraud which is requisite to an estoppel.”

This language has several times been quoted, both in the *Kroger* case and elsewhere. In the *Albany Peanut* case, the Court continued (p. 473):

“A mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel, even though reliance is placed on such promise and damage is occasioned by such refusal. The acts and conduct of the promisor must so clearly indicate that he does not intend to avail himself of the statute that to permit him to do so would be to work a fraud upon the other party.”

“Reasonable certainty” as to the terms of the oral contract would seem a minimum requirement in view of the fact that defendant is being deprived of the statutory protection. In the instant case, it cannot possibly be said that the terms of the contract were proved with reasonable certainty. Plaintiff’s testimony was uncertain and indefinite as to the terms of the alleged contract and, indeed, left entirely open the question whether any agreement was reached at all. In fact, plaintiff’s version of what occurred in March did not differ materially from what occurred in September, January and April. In each instance, plaintiff sought a contract; in each instance, plaintiff was told that no commitment could be made until the certificate to operate out of Portland and Seattle was granted.

Furthermore, under the doctrine of the *Albany Peanut* case, mere reliance on an oral promise is not sufficient to create the estoppel. Defendant must have induced plaintiff to waive a written contract and represented that it did not intend to avail itself of the statute. There is no evidence whatever that in the instant case the defendant represented to plaintiff that he would not need a written contract, or that the parties could get along without one.

Perhaps the most recent case in which equitable estoppel has been invoked to prevent a party to an oral agreement from relying upon the statute of frauds is *Federal Land Bank of Omaha v. Matson* (1942), 68 So. Dak. 538, 5 N. W. 2d 314. In that case the Court said, per SMITH, J. (p. 315):

“This court is committed to the view that the doctrine of equitable estoppel may prevent a party to an oral agreement from invoking the Statute of Frauds. *Rogers v. Standard Life Ins. Co.*, 54 S. D. 107, 222 N. W. 667; *Lampert Lumber Co. v. Pexa*, 44 S. D. 382, 184 N. W. 207. The elements of proof which invoke an estoppel in such case are three, namely, (a) *the oral agreement must be established by satisfactory evidence*; (b) the party asserting

rights under the agreement must have relied thereon and have indicated such reliance by *the performance of acts unequivocally referable to the agreement*; and (c) it must appear that because of his change of position in reliance on the agreement, to enforce the statute will subject such party to unconscionable hardship and loss. *Vogel v. Shaw*, 42 Wyo. 333, 294 P. 687, 75 A. L. R. 639; 78 Univ. of Pa. Law Review 51." (Emphasis ours.)

In the case at bar the evidence to establish the oral agreement was anything but "satisfactory". Furthermore, this opinion indicates that, whether the problem is approached from the point of view of partial performance of the oral contract or estoppel to insist upon a writing, the requirement is the same, to wit: that the plaintiff not only must have suffered damage in reliance upon the oral promise, but that reliance must be "by the performance of acts unequivocally referable to the agreement."

It is, no doubt, true in the instant case that in order for plaintiff to continue in defendant's employ it was necessary for him to give up his job with Western Airlines. On the other hand, his leaving that employment and foregoing whatever rights may have accrued to him under Western Airlines' contract with the Airline Pilots Association is not necessarily referable to plaintiff's alleged contract for the fixed term of two years. They are equally referable to continuation of an employment at will. The circumstances of plaintiff's age—the fact that he could not look forward to any very long period of service as a pilot—his acceptance of executive positions from time to time on leaves of absence from Western (120), all would tend to indicate that he may well have given up the employment with Western, not in reliance on a fixed-term contract, but merely with the expectation that he would be able to make good with defendant which, indeed, had made him a vice-president (152).

Thus, whether the reason for putting the statute to one side is "partial performance", or whether it is "promissory estoppel", and whether the law applied is that of New York or of some less exacting jurisdiction, plaintiff's voluntary surrender of his rights with Western Airlines under the pilots' union contract was not such act or conduct on his part as justifies disregard of the requirement of the statute, which concededly otherwise would cover this case.

### POINT III.

**The evidence establishes that plaintiff made no effort to mitigate damages and, therefore, any recovery for other than nominal damages was improper.**

Defendant introduced no evidence to the issue of plaintiff's willingness to seek other employment or his ability to get it. However, plaintiff's own testimony was such as to indicate both that he could have had other employment and that he did not choose to seek it. Apart from his experience as a pilot, to which plaintiff frequently referred, he had had ample experience as an executive. He had been an organizer of National Parks Airways and a vice-president in charge of its operations. He had been division superintendent of Western Airlines at Salt Lake City, Utah. While in Western's employ he had been granted leaves of absence to organize and reinstate Inland Airways, and he helped Seaport Airlines prepare its application for a Civil Aeronautics Board certificate. Most significantly, when he returned to Western after active duty in the Air Force, he had been given his choice of flying or taking an executive position (120).

The Court will take notice of the rapid expansion of commercial air services during the period in question and still continuing. Plaintiff's severance from defendant was under

circumstances which fully preserved his dignity and need not have mitigated against him (223).

Yet plaintiff chose to do nothing whatever and made no effort to secure employment (210). The very legalistic nature of his excuses: (1) that he had not been advised that he was no longer an officer of Alaska Airlines (substantially untrue, 143, 223); and (2) that the taking of an executive position in another airline might result in a violation of the Civil Aeronautics Act, indicates that he had no intention of mitigating damages (210-211).

In *Ransome Concrete Machinery Co. v. Moody* (2 C. A. 1922), 282 F. 29, the Court in affirming in a *per curiam* opinion the decision of Judge HOUGH below, approved his opinion, which said (p. 36):

“But the sentence above quoted from the Boyd case (which is itself but a quotation from Sedgwick on Damages) does not infringe upon the rule that it is incumbent upon the discharged employee to exercise reasonable diligence in seeking other employment; nor does it mean that the evidence moving the court must be introduced by the employer. Any party who takes the witness stand may, and often does, give evidence unfavorable to some branches of his own contention.”

(The reference to the “Boyd Case” is to a decision in this circuit, *American China Development Co. v. Boyd* (C. C. N. D. Cal. 1906), 148 F. 258.)

In this case it may truly be said that plaintiff on the witness stand has given sufficient evidence that upon the severance of his relationship with defendant he could have secured other employment and made no effort to do so. Hence, a verdict for more than nominal damages was unwarranted.

## POINT IV.

**There was no evidence upon which the jury might have determined that installments paid by plaintiff upon the purchase of a home were chargeable to defendant.**

Plaintiff exercised his control of defendant's affairs at Anchorage to withdraw substantial sums from the company's accounts. The total amount received by him during his management of defendant's business at Anchorage, other than salary payments, amounted to \$10,075.21 (290). It was plaintiff's failure promptly to submit vouchers in support of these withdrawals which led to the disagreement between him and Marshall and his relief from duties on August 22, 1951 (332-336). Some of plaintiff's claimed credits were not asserted until the trial, but ultimately defendant's accounting department allowed a credit of \$7,901.06 (290), leaving a balance of \$2,174.15, which was the amount demanded in defendant's counterclaim as amended at the trial (13, 305).

The second claim in the complaint was likewise amended at the trial to demand \$3,092.87, of which \$2,695.20 was a claim for "Wages accrued and not paid to October 15, 1951" (6, 305).

The jury found a verdict for plaintiff in the exact amount of this wage claim, \$2,695.20 (330), and no verdict on the counterclaim.

Not only did the jury render no verdict on the counterclaim, but it disregarded additional items of expense claimed by plaintiff in his second cause of action: "travel expenses \$218.36", "moving expenses \$179.31" (6, 305). If the jury had taken the view that plaintiff's contentions as to his expense account were right and defendant's wrong it should have allowed these items also. Its failure to do so, or to render any verdict at all on the counterclaim,

rather indicates that the jury was inclined to hold itself aloof from unraveling this complicated expense account.

Defendant would be glad to follow the jury's example and relieve this Court of any obligation of examining any item of the account. However, since defendant's statement of account upon which its counterclaim was based credited plaintiff with unpaid salary (probably less deductions) in the amount of \$1,932.60 (289), the jury has in effect allowed plaintiff credits to offset all of his withdrawals from defendant's funds, or \$10,075.21, plus \$2,695.20.

One of these credits which the jury has so allowed is so fantastic and so foreign to any fiduciary's expense account that defendant cannot let it pass on this appeal. Plaintiff, under the heading "Excess costs in Anchorage to October 15, 1951, \$2,165.25", actually charged defendant for payments of \$250 per month for eight months paid upon a contract for the purchase of a home for himself at Anchorage (217).

Plaintiff's explanation of the theory of this charge was that the purchase contract provided that if he should not complete his purchase the installments paid should stand as rent (217), though he conceded that if he should sell the house for as much as the purchase price, he would be completely reimbursed (218). Plaintiff was still residing in Anchorage and presumably in the house at the time of the trial.

The Court charged (313):

"Before you can find that the plaintiff is entitled to charge against the defendant the cost of making payments for the purchase of a home, or the rental of a dwelling house or the cost of purchase of clothes for his family, or the hire of a car to locate an apartment, you must find that the defendant agreed that such expenses would be paid by the defendant."

Any finding that defendant obligated itself to pay plaintiff's living expenses in excess of his salary is based upon

testimony of plaintiff of the most vague and general character (123, 128, 167-8, 192, 212-3, 216, 269). Certainly, there is no evidence anywhere in the record upon which the jury could possibly have found that defendant had agreed to buy plaintiff a home. Accordingly, there is no evidence upon which the jury, following the Court's correct instructions, could have found a verdict that plaintiff was entitled to a contribution of \$2,000 from defendant for the purchase of his residence in Anchorage. Yet that is clearly what the jury has done. Manifestly, the verdict upon plaintiff's second claim must be reduced by \$2,000.

### **Conclusion.**

There was no evidence upon which the jury could have found a contract, written or oral. Even if an oral contract could be spelled out from plaintiff's account of the March meeting, such a contract was barred by the statute of frauds, and under the applicable law defendant was not precluded from asserting that defense. At all events, only nominal damages should be found upon the first claim since plaintiff, upon his own testimony, wilfully refrained from seeking employment open to him in the air industry.

The effect of the jury's verdict on the second claim, and of its failure to render a verdict on the counterclaim, is that defendant has been required to contribute to the purchase of a home for plaintiff in Anchorage. There is no evidence that defendant ever made so extravagant a promise.

Since defendant does not choose to burden the Court with inquiry into the items of the controverted expense account, the verdict on the second claim must be permitted to stand, but only to the extent of \$695.20, the amount by which plaintiff's claim for unpaid salary, \$2,695.20, exceeds \$2,000, the amount which plaintiff withdrew from defendant's bank account for the purchase of real estate.



In view of the disparity between the amount claimed and the amount to which plaintiff is entitled, no counsel fee should be allowed. The judgment should be modified by a reduction thereof to \$695.20 and, as so modified, affirmed.

Dated, Anchorage, Alaska, Feb. 28, 1953.

McCUTCHEON, NESBETT & RADER,  
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*Of Counsel.*



No. 13,494

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

ALASKA AIRLINES, INC., (a corporation),

*Appellant,*

vs.

ARTHUR W. STEPHENSON,

*Appellee.*

Appeal from the District Court, Territory of  
Alaska, Third Division.

**BRIEF FOR APPELLEE.**

---

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No. 13,494

IN THE

**United States Court of Appeals  
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ALASKA AIRLINES, INC., (a corporation),

*Appellant,*

vs.

ARTHUR W. STEPHENSON,

*Appellee.*

**Appeal from the District Court, Territory of  
Alaska, Third Division.**

**BRIEF FOR APPELLEE.**

---

**I.**

**STATEMENT RELATING TO PLEADINGS  
AND JURISDICTION.**

This is a appeal taken from a final judgment rendered on the 18th day of April, 1952, by the District Court for the Territory of Alaska, Third Division, in favor of the appellee (plaintiff in the lower court) and against the appellant.

The District Court for the Territory of Alaska is a court of general jurisdiction consisting of four Divisions, of which the Third Division is one. Juris-

diction of the District Court is conferred by Title 48 U.S. Code Section 101. See also Alaska Compiled Laws Annotated 1949, 53-2-1. Practice or procedure of the District Court, since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure which were extended to the courts of the Territory of Alaska on that date. 63 Stat. 445, 48 USCA 103 a.

Jurisdiction of this court to review the judgment of the District Court is conferred by new Title 28 USC Sections 1291 and 1294 and is governed by the Federal Rules of Civil Procedure.

Appellee takes no exception to the statement of appellant in its brief as to the pleadings in the case except that appellee calls the attention of the court to the fact that the appellee remained in the employment of the Alaska Airlines, Inc. as vice-president of the defendant corporation until dismissed, and at all times thereafter and up to the date of trial held himself ready, willing and able to perform the services of employment to the defendant corporation, all of which services of employment were refused by said corporation. (R 5.) The appellee further calls the attention of the court to the fact that the affirmative defenses interposed by the appellant at the close of the case were deemed denied. See instructions of the court, page 307 record.

## II.

**SUMMARY OF ARGUMENT.**

The appellant has claimed that the District Court erred in the following respects in the first cause of action: 1. That the evidence is insufficient to establish a contract between the parties, written or oral. 2. That the alleged contract was within the statute of frauds and the defendant is not estopped to assert its invalidity upon that ground. 3. That the evidence establishes that the plaintiff had made no effort to mitigate damages and therefore any recovery for other than nominal damages was improper. 4. That the verdict is contrary to the law and the evidence. 5. That the trial court erred in denying defendant's motion for a directed verdict in favor of the defendant, as made at the close of the plaintiff's case and as renewed at the close of all evidence. 6. That the trial court erred in denying defendant's motion for a judgment notwithstanding the verdict.

Appellant further claims as to the appellee's second cause of action that the appellee failed to establish a contract with the appellant to reimburse him for installments paid in the purchase of real estate in Anchorage, Alaska, in the aggregate amount of \$2,000.00.

For all practical purposes, errors urged by the appellant with the possible exception of the second point above referred to, are based upon the insufficiency of the evidence adduced by appellee in the court below. The law, as appellee submits, is well

established that the jury should be permitted to return a verdict according to its own view of the facts unless upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it the case is palpably for the party asking a peremptory instruction. See *Travelers Insurance Co. v. Ralph Randolph*, 78 Fed. 754, 759. Appellee believes that on the face of the record all of the points designated by appellant insofar as they touch the sufficiency of the evidence in the subject cause, and the questions here presented to the court in that regard, should be resolved in favor of the appellee for the reason that error is never presumed but must be positively shown. By the great weight of authority the court will not concern itself with sufficiency of the evidence unless all of the evidence before the lower court and jury is contained in the record. The sole purpose of review is to determine whether or not the appellant was fairly treated and the appellate court acts only upon a properly preserved and authenticated record. The duty to show error involves the necessary steps and the obligation to bring up more than a fragmentary record. (O'Brien's Manual of Federal Appellate Procedure, 1941, chapter 12, page 141.) A review of the designation of the contents of the record (R 338) discloses that such has not been done in this case by the appellant, upon whom the duty rests.

The appellee contends that the evidence, if the same in its entirety were before the court, would clearly show that the appellee was a skilled and highly desirable executive; that appellee had established himself

by long years of service with the Western Air Lines and had thereby created a seniority which inured to his benefit so long as he remained in the service of said company, and that regardless of whether appellee worked as a pilot or as an executive of said company, his future in the air carriers' industry was secured, and that with full knowledge of these facts, appellant, through its chairman of board of directors, induced and enticed the appellee to leave and depart from the services of the Western Air Lines to enter the employment of the appellant for a term and period of not less than two years at an agreed and stipulated salary, and that the appellee entered into performance of the contract in good faith and performed the said contract of services until such performance was made impossible by actions of the appellant, and that the appellee so changed his position and acted to his detriment in reliance on and in fulfillment of the oral contract of employment of appellant, that to disturb the final decision of the lower court would in fact be fraud in itself. Appellee believes that to disturb the judgment or verdict of the lower court would be to defeat the very purpose for which the statute of frauds was enacted and would in effect be using the statute of frauds as an engine of fraud.

Appellee contends that the jury, having all of the evidence before it, was properly instructed in regard to the existence or non-existence of an oral contract, (R 53-54) and that the jury having been so properly instructed, necessarily foreclosed the question as to the existence or non-existence of the contract of em-

ployment unless and until the appellant, with the entire evidence in record before this court, can establish to the contrary, and not having brought forward the full record, appellant is foreclosed of the right to argue sufficiency of the evidence. Appellee further calls attention of the court to the fact that the lower court made a specific finding on the judgment, as follows (R 74):

“The Court expressly finds that the plaintiff Stephenson surrendered his employment with Western Air Lines and his seniority therein, for what the plaintiff then and thereafter believed to be a contract of employment of the plaintiff by the defendant for the period of at least two years at compensation of at least \$1300.00 per month. The jury by its verdict on the plaintiff’s first cause of action has necessarily determined that such a contract was made and rendered verdict on the first cause of action accordingly.”

Appellee believes that the only substantial question presented by the appellant is the matter of the statute of frauds and in this respect submits that the action of the appellee pursuant to the terms of the agreement of employment, and in reliance thereon, changed his position to his detriment; and further that appellant, through its agent Marshall, stood by and remained silent at a time when duty commanded that he speak and that the appellant shall not be heard at this time for the reason that the doctrine of estoppel commands appellant to silence. The doctrine of estoppel as universally applied in the courts of law and equity of

the United States, removes the case from the operation of the statute of frauds.

The court properly denied appellant's motion for an instructed verdict and likewise properly denied appellant's motion for a judgment notwithstanding verdict and motion for new trial, and accordingly judgment of the District Court should be affirmed.

---

### **ARGUMENT.**

Appellee believes that the facts necessary for the consideration of this court and pertinent to argument can be briefly stated as follows. Appellee Arthur W. Stephenson had at all times between May 5, 1928 and September 18, 1951, been either a pilot, director, vice-president or superintendent of commercial airlines. (R 119.) Appellee had first been associated with the National Park Airways as organizer and was with that company until it was sold to Western Air Lines, Inc. in 1937, and then stayed on as a divisional superintendent for Western Air Lines, Inc. at Salt Lake City. (R 120.) Appellee had from time to time been called away from his duties, either to return to active flying service in the United States Air Force or to aid and assist other corporations in obtaining certifications or reorganization and appellee acted in that capacity for Inland Airways and Seaport Air Lines and accordingly, as the record will show (R 110-120) from the period of 1928 through 1951, or for more than 20 years prior to his employment

with Alaska Airlines, had held positions of high responsibility and trust and had every expectancy, so far as the record shows, to continue in the employment with Western Air Lines until retirement.

It was in this happy position that the appellee found himself when on or about September 15, 1951, Alvin T. Adams, manager of an aviation consultant firm, apparently located in the City of New York (R 121) placed a telephone call and requested the appellee to consult with appellant's chairman of board of directors in regard to the affairs of the Alaska Airlines, Inc. Appellee was requested (R 121) to go immediately to Anchorage, Alaska, to take charge of the operations of Alaska Airlines, Inc. as a general manager. The record clearly shows (R 120 through 122) that the appellant sought out the appellee, offered him a proposition of employment pursuant to which appellee took the maximum period of leave from the Western Air Lines, and it was understood at the time of the initial meeting that the appellee would take charge for a period of from six weeks to three months and thereafter a long range agreement would be worked out. It was agreed at the initial meeting that the employment for at least two years at a salary of at least \$1300.00 per month would continue regardless of the certificate sought by Alaska Airlines, Inc. (R 123-5.)

Appellee was bound under penalty of losing his status as a senior pilot with Western Airlines, Inc to return to the employment of Western Airlines, Inc.



on or before March 18, 1951, all of which was made known to Marshall, chairman of the board of directors for appellant. (R 129.) Appellee contends that even with the state of the record as it is, and without the entire record before the court showing partial performance by the appellee, and giving full force and effect to the evidence adduced by the appellee and in the most favorable light to the appellee, there can be but one conclusion, and that is that prior to March 18, 1951, appellant did in fact promise a contract and did induce the appellee to remain in the employment of the appellant to his irreparable damage. It is worthy of note that after March 18, 1951, appellant was still talking contract with appellee, if the testimony of R. W. Marshall is to be believed. (R 226.) If no agreement was ever made with Stephenson for a definite wage or period of time, why then would the parties still be discussing written contracts and tendering each to the other proposed written memoranda nearly a month after Marshall, as he testified, had advised appellee that they had no need for his services since he was duplicating Col. Bierds, who had now returned and was on the job functioning? (R 239.) (Plaintiff's Exhibit 17, R 263.)

If, as appellant contends, the employment was merely temporary, why then would Mr. R. W. Marshall testify in regard to the moving and moving expenses of Arthur W. Stephenson? (R 226.)

“Q. What were the terms of the employment—how much was he to receive?

A. He was to receive \$1000.00 per month plus \$300.00 per month for living expenses while he was in Anchorage before he moved, or, rather brought, his family to Anchorage.”

Appellee believes that the points raised by appellant involving sufficiency of the evidence are not properly before the court for the reason that all of the evidence is not in the record, and further believes that the obligation to bring up the record lies upon appellant.

It is to be noted that under the designation of contents of record set forth as follows:

“Designation of Contents of Record.

Appellant desires the entire record printed in this case with the following exceptions:

1. Defendant’s Exhibit ‘A’.
2. None of the reporter’s transcript with the exception of pages 5 through 108; pages 119 through 123; pages 135 through 147; pages 203 through 205; pages 316 through 426.” (R 338.)

there is deleted pages 124 to 134 (R 211-213), pages 148 to 202 (R 223-224), and pages 205 to 315 (R 225-226) of the transcript, or a total of 175 pages of transcript of testimony. In addition, there has been deleted all of the exhibits of plaintiff and defendant save and except as to five listed in the index of the record as plaintiff’s Nos. 1, 5, 15, 16 and 17.

By the great weight of authority, this court or any other appellate court cannot be requested to search the transcript in order to establish evidence not prop-

erly preserved in the record. While it is conceivable that the appellant might urge this court that he has selected all of the pertinent evidence bearing upon point 2 (R 338) of his specification of errors, it is almost inconceivable that the appellant could urge this court with any weight of authority to the effect that his selections of excerpts from the record were proper selections for this court to fairly meet and decide the question of the sufficiency of the evidence of the plaintiff's case in the lower court to entitle the matter to go to the jury.

The matter has been decided in practically all state courts so far as the plaintiff has been able to determine, that a moving party is precluded from challenging the sufficiency of the evidence unless all of the evidence is included in the record on appeal. In this regard the court's attention is called to *Bracken v. Bracken*, decided in the supreme court of South Dakota December 21, 1927, cited at 217 N.W. page 192, wherein the court was considering a matter arising out of a divorce action and a subsequent proceeding for partition of lands and a general accounting between the parties. The court stated as follows:

“Practically all the assignments of error are based upon the insufficiency of the evidence to support the findings of the court and its conclusions of law. Respondent points out that the abstract of the evidence is not complete, because the evidence taken in the former trial is not included. The transcript of the evidence of the former trial was introduced in evidence, but

appellant says such evidence is immaterial upon any of the issues now before the court, and it was not necessary to include such evidence in the brief, and contends that the abstract is complete and sufficient and contains all the material evidence to properly present the questions raised on this appeal. If the omitted evidence is material, then this court will not consider the assignments based on insufficiency of the evidence, but will presume the findings have support in the evidence. The former relations of the parties cannot be considered as giving the woman any rights incident to marriage or any rights in lieu of marital rights, nor can equity consider the woman as a wife for the purpose of compensating her for wifely duties performed, but the assumed relationship may have a very material effect upon contracts between the parties. If a woman should assume the duties of a housewife and care for a home, while the man assumed the duties of a husband and ran the farm, although both parties knew there was no marriage, such assumed relation might have a great bearing in determining the right to wages of one against the other, or upon the interest of each in the property acquired in the joint enterprise. What the respective rights may be in such case need not be decided, but that the rights of the parties and interest in the acquired property would differ in such case, from the rights and interests of parties not engaged in a joint undertaking, cannot be doubted.”

The District Court of Appeal, Third District of California, (1952) in deciding the case of *Whalen v.*

*Ruiz, et al.*, cited at 242 Pac. (2d) 78, came to the same conclusion, citing 2 Cal. Jur. at page 697:

“The appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal.”

On the face of the record, it is clear that not all of the record has been brought forward, nor have the exhibits pertinent thereto been included therein. Appellee contends that the rule is properly laid down by the Circuit Court of Appeals, Eighth Circuit in *Nolan v. United States*, cited at 75 Fed. (2d) 65, where the court stated as follows:

“The rules of law which are here governing are well established. They state the basic principles of judicial review in law cases. The first is that the sole purpose and function of such review is to determine whether the appellant has been denied a fair trial (which is his right) through prejudicial error committed in connection with the proceedings in the trial court. *Stokes v. United States*, 264 F. 18, 24 (C.C.A. 9). The second is that such error will not be presumed, but must be affirmatively and clearly established by appellant. *Mercantile Trust Co. v. Hensey*, 205 U.S. 298, 306, 27 S. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572; *Loring v. Frue*, 104 U.S. 223, 224, 26 L. Ed. 713; *Kearney v. Denn*, 15 Wall. 51, 56, 21 L. Ed. 41; *Miller v. United States*, 11 Wall. 268, 299, 300, 20 L. Ed. 135; *Rector v. United States*, 20 F. (2d) 845, 859 (C.C.A. 8); *Bankers' Trust Co. v. M., K. & T. Ry. Co.*, 251 F. 789, 798 (C.C.A. 8). The third

is that the appellate court can and does act only upon the record (properly preserved and authenticated) of what took place in the trial court in determining whether the error claimed is present. *Bechtel v. United States*, 101 U.S. 597, 600, 26 L. Ed. 1019; *Kearney v. Denn*, 15 Wall. 51, 56, 21 L. Ed. 41; *Cohens v. Virginia*, 6 Wheat. 264, 409, 410, 5 L. Ed. 257.

In such determination from the record, it is obvious that the appellate court cannot determine whether the claimed error exists, unless it is reasonably sure that it has before it in the record all that took place in the trial court bearing upon the matter to be examined. Fragmentary records lacking any statement or stipulation therein or any certificate thereto that all trial proceedings pertinent to the claimed error are included leave the appellate court helpless to determine therefrom whether it has a complete record for the issues presented to it and therefore unable to declare error or lack of error. The duty to show error involves, as a necessary step therein, the obligation to bring up a sufficient record therefor, and, where appellant fails to do so, he has not sustained the burden of showing error."

The same rule is laid down in *Eddie v. Schumacher Wall Board Co.* decided in the District Court of Appeal, Second District, Division One, California, in 1926, cited at 249 Pac. 235. Indeed the appellee has been unable to find authority to the contrary on the proposition that the entire record must be before the court for the moving party to challenge the sufficiency of the evidence. In the case at bar, the

sufficiency of the evidence runs not only to the existence or non-existence of an oral agreement which was specifically found by the jury under the instructions of the court in the case at bar, but also as to the matter of performance, extreme hardship and change of position in reliance upon the agreement of employment between the parties litigant.

Since we would have to dispose of the matter of the sufficiency of the evidence before we could consider the matter of partial performance and estoppel in this regard, it should be called to the attention of the court that the lower court in its decree and judgment, expressly found that the plaintiff Stephenson surrendered his employment with Western Air Lines and his seniority therein, for what the plaintiff then and thereafter believed to be a contract of employment of the plaintiff by the defendant for a period of at least two years at a compensation of at least \$1300.00 per month. The jury by its verdict on the plaintiff's first cause of action has necessarily determined that such a contract was made, and rendered verdict on the first cause of action accordingly. The law, as appellee believes, makes unnecessary any further consideration of the specific finding hereinabove recited for the reason that an appellate court will not interfere with the trial court's fact-findings on conflicting evidence.

*Bradley v. Osborn*, 194 Pac. (2d) 53, District Court of Appeal, Third District of California, 1948.

The main consideration then before this court is as to where the contract of employment was made and whether or not the said contract was removed from the statute of frauds.

Appellant contends that promissory estoppel is not recognized in the State of New York and that the contract is controlled by *rex loci contractus*, although appellant admits that the law of New York and the law of the Territory of Alaska, being the situs of the performance of the contract, are substantially the same.

In this connection appellee contends that promissory estoppel as such is a label applied to the end result rather than being a proposition of law itself, and that if the courts of New York arrive at the same conclusion, although they use not the phrase or label of promissory estoppel, that the result, whether the matter under consideration is decided under the laws of the State of New York or the Territory of Alaska, would be one and the same.

Appellee contends that the case at bar should be governed by the landmark California case decided in the Supreme Court of California in 1909, *Seymour v. Oelrichs, et al.*, 156 Cal. 782, 106 Pac. 88. It is the contention of the appellee that once it is established that a jurisdiction recognizes the doctrine of estoppel, regardless of whether that label is applied thereto, it is then merely a matter of squaring up the facts of a given situation with the formula of estoppel and the resulting decision follows as a matter of course.



It is interesting to note how closely the facts in the case at bar parallel those of the above mentioned *Seymour* case. The plaintiff in the *Seymour* case was Captain of Detectives in the police department of the City and County of San Francisco, at a salary of \$250.00 per month. Under the law, he held practically a life position as Captain of Police, being removable therefrom only for good cause after trial. All of this was known to the defendants and to Charles L. Fair, to whose property the defendants had succeeded. Under these circumstances the defendants offered Seymour a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the police department and go into anything else unless he was certain of steady employment, and they told him that they would give him a 10 year contract at \$300.00 per month. This was asserted by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks, being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff:

“Now in regard to this contract, you leave that stand until I get back, and I will give you the contract.”

The facts were also made known to Mr. Oelrichs, who likewise gave his consent. This was on about June 1, 1902. The plaintiff relied absolutely upon the understanding that he was to have a written contract for ten years at \$300.00 per month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. Fair was killed near Paris, France, on August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received \$300.00 a month therefor to July 1 of 1904, when the defendants, having determined to sell all of their San Francisco property, discharged all of their employees, including plaintiff, and did thereafter refuse to recognize Seymour as an employee.

The court, after setting forth the standards in almost the identical language cited in the appellant's case of *Federal Land Bank of Omaha v. Matson* (App. Br. 24) went on to say:

“We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies ‘in every transaction where the statute is invoked.’ \* \* \* (Citing cases) The vital principle is that he who has by his language or conduct *leads* another to do what he would not otherwise have done shall not subject such person to loss

or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both.”

*Klein v. Farmer*, decided May 19, 1948, in the District Court of Appeal, First District, Division Two, California, cited at 194 Pac. (2d) 106, embracing a contract of employment as does the case at bar, is another case that comes clearly within the rule laid down in the *Seymour* case. The court in that case cited with approval and followed the rule of *Seymour v. Oelrichs*. In the *Klein* case the defendant had performed services for a period of seven years to an ailing person, since deceased, and had so changed her position that to deny her right to receive the stocks or the proceeds thereof would be to perpetrate a fraud since there had been an oral agreement with the deceased that if she stayed with him the stocks in question would be hers.

The *Seymour* case is cited with approval in *Columbia Pictures Corp. v. DeToth*, Supreme Court of California, 1945, cited at 161 Pac. (2d) 217. In this action the Columbia Pictures Corporation entered into an oral contract with the defendant to cover a period of employment of one year and the defendant, pleading the press of other business, continued the commencement of the term of employment for several weeks and actually obtained temporary employment from the plaintiff at an increased salary and later refused to sign the contract out of which this action

arose by way of declaratory judgment. It was an action by the Columbia Pictures Corporation against Andree DeToth for a declaration of rights and duties of the parties under an oral contract of employment. From a judgment of dismissal entered after a demurrer was sustained without leave to amend, plaintiffs appealed, and it was reversed. There was a four to two decision with the dissent by Spence. The court in the headnote stated:

“If modification of oral employment contract entered into for one year, by postponement for a few weeks of commencement date and by temporary employment of employee in the interim, was induced by employee’s fraudulent representations to the employer that he desired postponement because of other business commitments and by employee’s promises to reduce terms of agreement thus modified to writing and abide by it, employee would be estopped under such circumstances to assert that the employment contract was void under the statute of frauds.” (Cases cited at 161 Pac. (2d) 220.)

Viewing all of the evidence in the most favorable light to the plaintiff, the proof shows more than one element supporting removal of the subject contract from the statute of frauds, and the theory upon which it is removed is of little consequence.

Appellee calls attention to the *New York* case decided in 1929 titled *M. H. Metal Product Corp. v. April*, 167 N.E. 201, likewise involving Personal Property Law, Section 31, of New York. With Judge Cardozo presiding judge, the court clearly indicated

that a defendant would not be allowed to retain the fruits of fraud by the use of the statute. In that case the defendant guaranteed payment for jacks delivered to buyer corporation, of which defendant was a treasurer, and induced seller to change construction of jacks, consented to increase in price, and agreed to remain bound by his guarantee. The court held that defendant cannot now alter his position and avail himself of the Statute of Frauds (Personal Property Law Section 31) by asserting that defense on a contract of guaranty on the grounds that the alteration of the original written contract was not in writing. The New York Court in that case did not use the theory of promissory estoppel but arrived at the same conclusion as if the doctrine of estoppel had been applied.

In *Gorman v. Fried*, 35 N.Y. Supp. (2d) 441, the Court decided that in an action for installments due under a contract, defendant, by receiving and retaining the full consideration from plaintiff, namely the transfer of an automobile, was *estopped* (emphasis added) from asserting the statute of frauds as a defense. In the *Gorman* case at least the New York courts paid lip service to the doctrine of estoppel and the same result was achieved in the *M. H. Metal Products Corp. v. April* case, *supra*, without such lip service, but apparently on the proposition that the statutes could not be used as an engine of fraud.

Thus appellee contends that the label or theory of the court in arriving at a decision is of little moment

but it is only the end result which is of importance to the litigants.

Likewise in the *New York* case *In re Melia's Estate*, decided in 1950, 98 N.Y. Supp. (2d) 941, the court specifically held that the statute of frauds is a device designed to prevent—not to perpetuate fraud. There likewise the doctrine of promissory estoppel did not pass the lips of the court but the net result and the holding of the court would have been the same had said doctrine been invoked in name as well as in practice.

In *Weiss v. Weiss*, decided in 1944, 49 N.Y. Supp. (2d) 128, the Supreme Court further decided the matter that the statute of frauds could not be used as an engine for fraud and in that case Personal Property Law Section 31 was under consideration. The appellants, defendants below, had induced the appellee to cease negotiations for reorganization of his business and had promised to pay the sum of \$50.00 per week for life to the appellee providing he would cease efforts to reorganize his business. The appellants had in fact secured control of the business and had purchased the mortgages and encumbrances on the business and had the same under control at the time the promise was given and accordingly the defense of the statute of frauds was not available. In other words, it would appear that the courts of New York subscribe to the proposition that it is the contents of the bottle—not the label thereon—that cures the patient.

In *Roberts, et al. v. Fulmer*, cited by appellant, 93 N.E. (2d) 846, 1950, in an action by alleged buyers for specific performance of an alleged oral contract to sell a farm, evidence, among other things, of extensive improvements by buyers, sustained determination of official referee, the late William F. Dowling, that contract was one of sale rather than tenancy and that there had been a part performance by the buyer which would take the case out of the statute of frauds. Real Property Law, Section 259, New York. This case lends weight to the analogous reasoning of the appellee in the instant litigation.

In appellee's treatment of the statute of frauds insofar as it bears upon the case under consideration, it is submitted that there are at least three different views or theories under which the statute of frauds can be unavailing to the party advancing the shield of its protection. In the first place, performance of the contract, either partial or in whole, will in some instances meet the requirements of the court in its deliberation; two, where a proposition for a contract to make and execute a certain agreement, the terms of which are specific and mutually understood, is in all respects as valid and obligatory, where no statutory objection is interposed, as the written contract itself would be if executed. The court expressed this reasoning and theory in *McLachlin v. Village of Whitehall*, 99 N.Y. Supp. 721, as taken from the case of *Pratt v. Hudson River Railroad Co.*, 21 N.Y. 305; and three, the doctrine which originally grew out of equity holding one estopped from relying upon the

statute of frauds where to do so will amount to the practice of fraud and this doctrine is not limited in its operation to any particular class of contract but applies in every transaction where the statute is invoked. *Seymour v. Oelrichs, et al.*, Supreme Court of California, 1909, 106 Pac. 88. The doctrine is closely akin to the reasoning that the law abhors a forfeiture and equity will not tolerate such.

That the oral agreement has been established is, as appellee contends, a foreclosed question for the reason herein stated that the sufficiency of the evidence is not reviewable in the absence of a record containing all of the evidence before the lower court. (See cases cited supra.)

That the appellee relied upon the agreement is borne out by the performance of the contract by the appellee and by his severance of his relationship with Western Air Lines, Inc.

The instructions of the court in this regard were ample and the court, pursuant to the verdict of the jury, has properly found in this respect. (R. 74.)

That the appellee suffered an irreparable loss or damage can hardly be disputed since the fruits of his labors with Western Air Lines, Inc. and the accumulation of over 20 years of seniority were lost by the actions of the appellant which resulted in the bringing of the present case. It would appear from the record that the appellee Stephenson acted as a reasonable and prudent man would act in discharging the higher affairs of life and the acts of Stephenson



in travelling from Anchorage to New York to settle a matter of great concern to him at the time stated, was an act of a magnitude that either did or should have put the appellant on notice that a day of decision was at hand.

So far as the doctrine of estoppel is concerned, it can be generally broken down into three groups. 1. By deed. 2. By matter of record. 3. By matters in pais, the last of which are also termed equitable estoppels. (See Bouvier's Law Dictionary unabridged, Vol. 1, 1941 edition, page 1078 through 1084.)

There is no question as to the attitude of the Alaska District Court in regard to estoppel in pais since that matter was decided in *Rasmuss v. Carey, et al.*, in 1947, cited at 11 Alaska Reporter 456. In a dispute arising over the working of a mining claim, the defense of the statute of frauds was interposed, citing section 4315, subsections 5 and 6, CLA 1933 (presently ACLA 1949 58-2-2) which sections made agreements void unless some written memorandum thereof expressing the consideration be in writing and subscribed by the party to be charged or his lawful authorized agent, and the court held that:

“Equity would not allow the statute of frauds to be used as a means of effecting the fraud it is designed to prevent.”

And further that when, as in this case where the mining claim owner expended money, performed work, and permitted neighboring claim owners to use his land on strength of an oral agreement permitting

the claim owner to dump tailings on the neighboring claim as a reciprocal arrangement, neighboring claim owner was estopped from asserting the statute of frauds against the enforcement of the agreement.

In the United States Court of Appeals, Ninth Circuit, in *Union Packing Co. v. Cariboo Land and Cattle Co.*, September 24, 1951, rehearing denied on October 23, 1951, 191 Fed. (2d) 814, this court stated that the principle is well settled as set out in the leading case of *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88. The *Union Packing Co.* case dealt with the proposition that where a packing company and cattle producer entered into an oral contract for the purchase and sale of livestock, and cattle company expended large sums of money in the course of executing the contract, even though the contract involved values in excess of \$500.00 and was required to be in writing under California law, which was applicable to the transaction, expenditures of the cattle producer created an equitable estoppel against the application of the statute of frauds.

In *Holton v. Reed, et al.*, U. S. Court of Appeals, Tenth Circuit, decided December 13, 1951, 193 Fed. (2d) 391, the court said:

“Where one party to an oral contract has, in reliance thereon, so far performed his part of the agreement that he would suffer an unjust or an unconscionable injury and loss if other party should be permitted to set up the statute of frauds as a defense, equity will regard such case as removed from the operation of statute and will enforce the contract by decreeing specific per-

formance of it or by granting other appropriate relief.”

In the last above named case the defendant purchased stock in a bank, caused shares purchased to be distributed between himself and the plaintiff's husband so that each would own an equal number of shares and defendant signed joint notes with the plaintiff's husband to secure funds with which to purchase said stock for the purpose of obtaining control of a bank. Defendant and plaintiff's husband each agreed to acquire the shares of the other upon the death so as to maintain control in the bank. Plaintiff as executrix of her husband's estate, was estopped to assert the statute of frauds as a defense to the defendant's counter claim for specific performance of oral contract to convey stock upon the death of her husband.

On the question of estoppel see Section 808 Pomroy's Equity Jurisprudence, Vol. 3, 5th edition:

“\* \* \* In fact, the more specific rules, the varying phases of opinions, and the partial conflict of decisions have arisen in actions at law rather than in equity. The treatment of the subject by courts of equity has generally been simple, uniform and consistent. The conduct creating the estoppel must be something which amounts either to a representation or a concealment of the existence of facts; and these facts must be material to the rights or interests of the parties affected by the representation or concealment, and who claim the benefit of the estoppel. The conduct may consist of external acts, or language written or spoken, or of silence. The facts represented

or concealed must, in general, be either existing or past, or at least represented to be so.”

### Section 808 b Promissory Estoppel:

“The general rule stated in the preceding section (808) that in order to furnish the basis of an estoppel, a representation or assurance must relate to some present or past fact or state of things, as distinguished from mere promises or expressions of opinion as to the future, must be qualified. There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. (Citing the Seymour case at 156 Cal. 782; 106 Pac. 88). Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice. The name ‘promissory estoppel’, has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations. (Citing *Fried v. Fisher*, 328 Penn. 497; 196 Atl. 39; 115 A.L.R. 147). On the other hand, it has been said with good authority that the doctrine of promissory estoppel has been adopted as the equivalent of consideration, or substitute for consideration. (Williston on Contracts, Section 116, 139.) It is important to bear in mind that the doctrine is much older in its origin and application than the terminology now employed to describe it. Illustrative cases abound in the reports, especially since the formal embodiment

of the principle by the American Law Institute in the Restatement of the Law of Contracts, as follows:

‘A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.’ Citing the Restatement of Contracts, page 110 at section 90.”

Williston on Contracts, Vol. 1 revised edition 1936 at page 503, section 140, follows the above quoted section of the Restatement of Contracts with the following language:

“Although the Restatement does not use the term ‘promissory estoppel’, it here restates that doctrine in carefully formulated language.”

After a careful review of the existing case law, appellee is forced to the conclusion that under the law of the State of New York, had the facts as presented in the *Seymour* case been decided in the New York jurisdiction, the decision would be one and the same even though the New York court would in all likelihood, as indicated by Williston, have refused to use the label promissory estoppel. As heretofore pointed out, it is the end result and not the label that counts.

We have already come to the conclusion that the New York courts arrive at the same position as those jurisdictions which admittedly apply the doctrine of

estoppel. A review of the authority of New York convinces the writer that the courts of New York have never squarely faced the issue here before the court. Appellant in its brief has called the attention of the court to cases involving the statute of frauds of the State of New York, South Dakota, California and other jurisdictions and urges the courts by analogy that these cases of other jurisdictions, including New York, do not recognize the doctrine of promissory estoppel in such cases as the one at bar.

Since as appellee believes, the New York courts have not met and decided the issue here confronting us, the appellee can only resort to analogous reasoning and based upon the cases cited herein is forced to the exact opposite conclusion of that arrived at by the appellant in its brief.

It is admitted that the law of New York and the law of the Territory of Alaska, insofar as the statute of frauds is concerned, is substantially the same. Appellee submits that it is pure speculation on the part of the appellant that the relief afforded by the lower court in the base at bar to the appellee is incompatible with the law of New York. The appellant recites that the New York Court of Appeals gives a clear answer as far as that court is concerned and in that connection cites *Roberts v. Fulmer*, 1950, 31 N.Y. 277; 93 N.E. (2d) 846 at 848. The appellant takes the dissenting opinion in that case as a somewhat more full restatement of the law, notwithstanding the fact that the majority opinion in the *Roberts v. Fulmer* case recognized the doctrine of estoppel in carefully

couched language. *Roberts v. Fulmer*, decided in 1950, is obvious proof that the State of New York recognizes in practice the doctrine of estoppel which has been in vogue in a majority of the states for the last half century.

*Wikiosco v. Proller*, decided in 1949, cited at 94 N.Y. Supp. (2d) 645, likewise cited in appellant's brief, stands for the proposition that the statute of frauds is a rule of evidence which is likewise the case in the Territory of Alaska. The Territory of Alaska sets forth in its code, Chapter 2, Volume 3, ACLA 1949 at section 58-2-2 under "Indispensable Evidence" herein cited supra, our so-called statute of frauds. Appellee is therefore led to the inescapable conclusion that the statute of frauds in the Territory of Alaska and likewise in the state of New York is procedural and accordingly the case presently being considered by the court would not be barred in either jurisdiction and the appellee, in order to answer the appellant, must only establish that the doctrine of estoppel is recognized in the jurisdiction of Alaska since the law of the forum controls the matter of evidence.

Support of this proposition is found in the American Law Institute, 1934 Restatement of the Law of Conflict of Law, page 702, section 585, as follows:

“§585 WHAT LAW GOVERNS PROCEDURE.

ALL MATTERS OF PROCEDURE ARE GOVERNED BY THE LAW OF THE FORUM.

Comment:

a. Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment. The rules covering these problems specifically are stated in subsequent sections in this chapter."

The appellee does not contend that the proposition hereinabove stated is without conflict or without exception but the subsequent sections referred to in the Restatement of the Law above quoted, at section 597 titled Evidence, is as follows:

"The law of the forum determines the admissibility of a particular piece of evidence."

It would, however, appear that since, as cited above, *Wikiosco v. Proller* stands for the proposition that the statute of frauds in the State of New York is a rule of evidence and therefore procedural, it would necessarily follow that the law of the forum controls and that the District Courts of Alaska recognize the doctrine of estoppel as set forth in *Rasmuss v. Carey*, *supra*.

Appellant in its brief recites that perhaps the most recent case in which equitable estoppel has been invoked to prevent a party to an oral agreement from relying upon the statute of frauds is *Federal Land Bank of Omaha v. Matson, et al.*, 1942, 68 So. Dak. 538; 3 N.W. (2d) 314. The appellee has no argument



with the decision laid down in the Supreme Court of South Dakota and submits that the rule so expounded is representative of the greater weight of authority within the United States. In that cause the action arose not out of a contract for personal services but on an alleged oral lease of real estate. The initial action was one of forcible entry and detainer by the Federal Land Bank of Omaha against W. L. Matson and others. From an adverse judgment the defendants appealed and the Supreme Court reversed the lower court because of erroneous instructions given by the trial court with the terse statement:

“We deem it sufficient to suggest the theory of estoppel to the trial court.”

The standards laid down in the *Federal Land Bank of Omaha* case were three, namely, (a) the oral agreement must be established by satisfactory evidence; (b) the party asserting rights under the agreement must have relied thereon and have indicated such reliance by acts unequivocally referable to the agreement, and (c) it must appear that because of the change in the position in reliance on the agreement, to enforce the statute will subject such a party to unconscionable hardship and loss.

Appellee submits that in the case at bar the three elements are amply supported by the evidence. The lower court, as herein recited, has specifically found, as has the jury, that a contract was in existence. There seems to be no question but that the appellee relied on the agreement and proceeded to perform

until the appellant made further performance impossible. Appellant has failed to state in any particular where the acts have not been unequivocally referable to the agreement and since the lower court has foreclosed the matter, it seems vain and useless to urge that point further on this court.

That the appellee has been subjected to an unconscionable hardship and loss seems so tolerably obvious from the record itself as to deserve little, if any, further argument. It was undisputed that Stephenson had accumulated valuable rights with Western Air Lines, Inc., that Marshall knew of those rights, that it had been explained to him that the rights would be lost if appellee did not return to Western Air Lines on or before March 18, 1951. (R. 128-129.) It would therefore appear that the case at bar meets the full measure of the test laid down in the *Federal Land Bank of Omaha v. Matson* case, cited as perhaps the most recent case even though the Territory of Alaska has a more recent case by five years.

In substance the instructions of the court in the *Federal Land Bank* case pointed out the controversy as to the terms of the oral agreement, advised that under SDC 10.0605 a lease for more than one year must be in writing, and that the question for the jury to decide was whether the defendant had a verbal agreement with the plaintiff to lease the 80 acres for 1941. To that portion of the instructions which dealt with the statute of frauds defendant excepted in the following words:

“The defendant excepts to instruction No. Two for the reason that the instruction is an instruction upon executory contract and that it does not include or instruct the jury as to the effect of performance, on the part of the defendants; that it does not instruct the jury that regardless of the fact that the lease may be oral and may be for more than one year, that if the contract is executed on the part of one of the parties that the same is a bona fide contract and without the statute of frauds regardless of the fact that it may be for more than one year.”

Appellee feels constrained to call to the attention of the court that the performance by the appellee in the case at bar was full and complete so far as was allowed by the appellant and the appellee, up to and including the time of trial, was ready, willing and able to go forward with his burden thereunder.

At pages 24 and 25 of appellant's brief, the three-point formula was set out by Judge Smith of the Supreme Court of South Dakota. The doctrine of equitable estoppel, insofar as the State of South Dakota is concerned was undoubtedly founded or at least in some wise influenced by the landmark Minnesota case of *Dimond v. Manheim, et al.*, 61 Minn. 178; 63 N.W. Rep. 495, decided in 1895, which case was referred to in Judge Sickles' dissenting opinion in *Kraft v. Corson County*, 24 N.W. (2d) 643, decided in 1946. The *Dimond v. Manheim* case involved laches as the basis of estoppel. There the plaintiff for more than 20 years after the foreclosure of a mortgage,

invalid because of mistake of the registrar of deeds in recording the names of the assignee of the mortgage, stood idly by and thence came in to claim invalidity of the foreclosure sale after the property had been much improved and the statute of limitations had long run. Judge Sickle stated in part as follows (Quoting from the *Dimond* case, 63 N.W. Rep. at 497):

“The authorities are, however, substantially all agreed upon the following general propositions: First. To create an estoppel, the conduct of the party need not consist of affirmative acts or words. It may consist of silence or a negative omission to act when it was his duty to speak or act. Second. It is not necessary that the facts must be actually known to a party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed to him. Third. It is not necessary that the conduct be done with a fraudulent intention to deceive, or with an actual intention that such conduct will be acted upon by the other party. It is enough that the conduct was done under such circumstances that he should have known that it was both natural and probable that it would be so acted upon.”

Applying these general principles to the case at bar and considering not only the partial performance of the appellee but also the incurable and highly prejudicial change of circumstances visited upon the appellee, it seems reasonable and logical that the clearest case of equitable estoppel is established.

As urged by the appellant, *Albany Peanut Co. v. Euclid Candy Co. of Calif.*, First District, 1938, 30 Cal. App. (2d) 35; 85 Pac. (2d) 471, stands for the proposition that a mere promise to execute a written contract, followed by refusal to do so, is not sufficient to create an estoppel. However the court was not there confronted with a proposition such as in the case at bar. Had the court then and there been confronted with partial performance, actions on the part of the plaintiff in reliance on the contract and to its irreparable damage, together with silence or acquiescence on the part of the defendant in allowing the plaintiff to so act, the result would, without question, have been the same as the decision in the landmark *Seymour* case.

*Hunter v. Sparling, State Superintendent of Banks, etc.*, District Court of Appeal, First District, Division One, California, 1948, cited at 197 Pac. (2d) 807, was an action by Robert Arnold Hunter against Maurice C. Sparling, State Superintendent of Banks and Liquidator of the Yokohama Specie Bank, Ltd., to recover balance due plaintiff for his retirement allowance. This case is another arising out of employment. Judgment for plaintiff and defendant appeals. The judgment was affirmed. Plaintiff had worked for the bank located in San Francisco from 1892 to 1941. His retirement benefits amounted to \$40,835.00, of which he was paid \$20,000.00 in November of 1941. The bank was thereafter transferred over to the Alien Property Division and this suit resulted for the re-

maining balance of some twenty odd thousand dollars. The evidence showed that the plaintiff had remained in the employment of the bank in question upon reliance of the employment benefits and retirement benefits and the court stated that under such circumstances the doctrine of promissory estoppel is applicable. The doctrine was well defined as follows in Section 90 of the Restatement of Contracts:

“A promise which the promisor should reasonably expect to induce action of forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.”

In *Beverly Hills National Bank and Trust Co. v. Seres*, decided in 1946, 172 Pac. (2d) 894, District Court of Appeal, Second District, Division One, California, involving an oral lease or agreement to make a lease for a term and period of five years, the court reversed the decision of the lower court directing a verdict for the plaintiff and remanded the cause for a new trial. Cited with approval is the *Seymour* case which would allow the doctrine of equitable estoppel to be applied where the defendant had entered into possession and paid money, made substantial improvements and had in fact been promised a five year lease.

The case of *Kaye, et al. v. Melzer*, District Court of Appeal, First District, Division One, California, decided in August, 1948, cited at 197 Pac. (2d) 50,

is an action by William E. Kaye and Abe Miller against Max Melzer to recover damages for breach of an oral lease. From an adverse judgment and from an order denying defendant's motion for a new trial, the defendant appeals and the judgment was affirmed and the appeal dismissed. In that case each of the parties plaintiff had given up positions of employment in cities far removed from the situs of the leasehold property and had secured repeated assurances from the defendant that all was well and that they would secure a three year lease. The defendant had made such statements as:

“Don't worry about it; everything is all right”,

\* \* \*

and

“You are worrying too much; open up and do business and everything is all right.” \* \* \*

The court in that case stated that there was no merit in the defendant's contention that the lower court erred in concluding that he was estopped to plead the statute of frauds.

“Ever since the case of Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, it has been the law in California that the equitable principle of estoppel applies to every case in which the statute of frauds is invoked.”

*Hayward v. Morrison, et al.*, Supreme Court of Oregon, 1952, 241 Pac. (2d) 888, was a suit for specific performance of an alleged oral contract for the sale and purchase of land by E. H. Hayward against

N. I. Morrison and wife. The Circuit Court, Linn County, Fred McHenry, J., entered a decree for specific performance and the defendant appealed.

“The supreme court, Tooze, J., held that where everything done by the parties was directly referable to and induced by oral contract for sale and purchase of land, defendant was estopped from taking position inconsistent with her acts and conduct and from relying upon the statute of frauds.”

The decree of the lower court was affirmed. Here the wife stood by for a period of about four years and watched the purchasers in possession make improvements and on one occasion advised the plaintiff that she didn't want to sign the deed now because she was angry with the defendant (her husband) over another deal that she wouldn't sign. Morrison and his wife were tenants by the entirety. In that case the wife listened to all of the oral transactions; there was no written contract, but some two or three years after the plaintiff went into possession, they did reduce to writing a memorandum of the remaining balance occasioned by the agreement of the defendants to make certain additional improvements on the property even though the plaintiff was in occupation and possession and was making improvements by his own right. Incidentally both parties paid taxes on the property although the plaintiff tendered the taxes back to the defendant. Now the statute involved made the agreement void, substantially the same as New York and Alaska.



“Under the statute of frauds an agreement for the sale of real property, or of any interest therein, is void, unless some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawful authorized agent. Section 2-909 (6) OCLA. Also is void an agreement concerning real property made by agent of the party sought to be charged unless the authority of the agent be in writing. Section 2-909 (7) OCLA.”

The court stated:

“Under this statute, therefore, the agreement in this case is void as against the defendant Jane Morrison, unless under some well-recognized rule of law or equity, the case is taken out from under the operation of that law.”

The court further stated and quoted Justice Latourette, in *Young v. Neill*, 190 Ore. 161, 166, 220 Pac. (2d) 89, 91, 225 Pac. (2d) 66:

“The statute of frauds was never designed to shield against the perpetration of fraud.” \* \* \*

“The foundation of this doctrine is fraud; not necessarily an antecedent or positive fraud, but a fraud inhering in the consequence of this setting up the statute. It applies where to permit the defense would be inequitable and unconscionable.” Citing again Oregon authority together with the *Seymour* case. Citing likewise *Walter v. Hoffman*, 267 N.Y. 365, 196 N.E. 291, 101 A.L.R. 919, and note commencing at page 926; 37 C.J.S., Frauds, Statute of, section 247, page 753.

It is well established that the District of Alaska looks for guidance in interpretation to the jurisdiction of Oregon, that being the fountainhead of our codified law.

The third point in the appellant's specification of errors is that the plaintiff below made no effort to mitigate damages and therefore any recovery for other than nominal damages was improper. It is called to the attention of the court that the plaintiff in his complaint alleged some \$22,100.00 damages or loss (R 7) by reason of the breach of the oral agreement, by way of loss of wages.

Appellee contends that the court properly instructed the jury in this regard (see instruction 7, R 312) and that the jury, in the proper discharge of its duty, took into account and consideration all items of mitigation and rendered verdict accordingly. It is at least undisputed that Stephenson could not have properly engaged himself in the services of another air carrier without peril of violation of Civil Aeronautics Act in regard to dual employment or connections with competing air carriers (R 210).

The matter of duty of mitigation is not a highly controversial field of law and is properly set forth in 15 *Am. Jur.*, at Section 31, page 428, as follows:

“§31. Duty to Enter Into Other Contracts—Duty to Seek Other Employment. The rule requiring a party injured by the breach of a contract to make reasonable efforts and exercise reasonable diligence to reduce or minimize the

resulting damages as much as is practicable may, in some circumstances, impose upon him the duty of entering into other contracts. To what extent it is his duty to protect himself from loss by seeking another contract of like character depends on the nature of the contract broken. On the breach of a contract of employment calling for personal services by the wrongful discharge of the employee, the latter is required to use reasonable efforts to obtain other employment of like nature for the purpose of lessening his damages. He should make such efforts as the average individual, desiring employment, would make at that particular time and place. Ultimately, the question of reasonable diligence is one for the jury's determination under all of the facts and circumstances of the case." \* \* \*

It is worthy of note that Stephenson was not a person who rendered ordinary services but his profession was a highly skilled classification which would normally descend upon air pilots and other employees of an air carrier who had long sustained services within the organization and that with a new or embryonic operation such as the Alaska Airlines might well be classified, its existence was not of such duration so as the corporation would have mothered its own brood of executive officers. It is reasonable then to assume that they would have to go in the open market, so to speak, purchase their talent and pay the premium. This they did and the wisdom of their judgment is reflected in the granting of certification

shortly after Mr. Stephenson entered into the performance of the agreement of employment.

Appellant would have us believe that Mr. Stephenson, although he has cut his bridges behind him, could go into the air carriers' industry and minimize his damages more or less at a moment's notice. It is submitted that this peculiar type of employment deserves a different consideration than would be afforded to a salesman, a laborer, a carpenter or a non-skilled individual.

As stated in *Am. Jur.*, Volume 15, Section 33, page 431:

“§33. Character of Employment Which Must Be Sought or Accepted. As a general rule, an employee who is wrongfully discharged before the termination of his contract of employment is not obliged to seek or to accept other employment of a different or inferior kind in order to mitigate the damages.” \* \* \*

It would therefore appear that the jury was properly instructed and that the matter of mitigation and the duty of the appellee to search for other employment was properly considered and disposed of by the verdict rendered in the lower court.

In regard to the fourth point raised by appellant in its brief, at page 28, the appellee submits that the only evidence in the record touching or concerning the matter of the rental of a dwelling by the appellee during his employment with Alaska Airlines and while stationed in Anchorage, is contained in the

record at pages 214 through 218. Nowhere in the record is there any evidence that the appellee was in fact purchasing a home instead of renting a home, except such inferential evidence as may be gleaned from counsel's leading questions. It appears that the testimony of A. W. Stephenson in that portion of the record recited is as susceptible to a lease option agreement as it is to a purchase contract unless we treat appellant's counsel's questions as evidence:

“Q. But it is a fact that if you sold the home for at least as much as your purchase price, you would get all that rental back, wouldn't you?”

A. If I was fortunate enough to do a thing like that.”

In view of the state of the record, it is again contended by the appellee that appellant's fourth specification of error is a matter that deals with the sufficiency of the evidence which, as appellee contends, is not reviewable unless all of the evidence is embraced in the record, which is not true in the present case. To conclude otherwise would be to put the burden on the appellate court of searching the transcript to supply the deficiency of the record, which practice is not in accord with the well established rule hereinbefore recited, since the obligation of sufficient record rests upon the appellant alone.

By reason of the authority hereinabove recited in regard to the main contentions of the appellant, there is no justification or reason for this court to now and here concern itself with an unsettled proposition

of law insofar as the State of New York is concerned. In view of the fact that the authorities unanimously agree that each case involving estoppel must be decided on its own facts, accordingly the verdict and judgment of the lower court should be affirmed.

Dated, Anchorage, Alaska,  
April 1, 1953.

DAVIS, RENFREW & HUGHES,  
By JOHN C. HUGHES,  
*Attorneys for Appellee.*

No. 13494

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IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

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ALASKA AIRLINES, INC., a Corporation,

*Appellant,*

vs.

ARTHUR W. STEPHENSON,

*Appellee.*

---

UPON APPEAL FROM THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA—THIRD DIVISION

---

**REPLY BRIEF FOR APPELLANT**

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FILED

MAY 20 1953

PAUL P. O'BRIEN

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IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA AIRLINES, INC., a Corporation,  
*Appellant,*

vs.

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*Appellee.*

No. 13494

UPON APPEAL FROM THE DISTRICT COURT FOR THE  
TERRITORY OF ALASKA—THIRD DIVISION

## REPLY BRIEF FOR APPELLANT

### I.

**There was no substantial evidence to support the jury's finding of a contract and this Court is free so to hold upon the present record.**

Appellant in its main brief maintained that the essential elements of a contract were not proved; that proof of the duration of the employment, date when the period of employment was to commence, amount of salary, and consideration for the employer's alleged promise were all lacking. And furthermore, upon plaintiff's own testimony, facts were proved which made it highly improbable that defendant would have entered into the alleged contract prior to the granting by the Civil Aeronautics Board of a Certificate of Public Convenience and Necessity. Appellee's brief has wholly failed to meet this argument. Instead, appellee has taken refuge behind two legal propositions: (1) "that an appellate court will not interfere with

the trial court's fact-findings on conflicting evidence"; and (2) that an appellate court will not consider the question of the sufficiency of the evidence unless all of the evidence is included in the record on appeal.

As to the first proposition, appellant is not asking the Court to resolve conflicting evidence. Actually the conflicts between Stephenson and Marshall were minor. But because the jury must be presumed to have preferred Stephenson's version to Marshall's, appellant's main brief based no argument at all upon Marshall's testimony. Appellee, upon his own case, simply failed to prove a contract.

As to the second proposition, appellant complied fully with Rule of Civil Procedure 75 and that was all that it was required to do.

The state cases cited by appellee (Brief, pp. 11-15) were all decided under different systems of appellate procedure. *Eddie v. Schumacher* (2d Dist. 1926) 79 Cal. App. 318, 249 P. 235, dealt with a "bill of exceptions"; *Bracken v. Bracken* (1927) 52 So. Dak. 252, 217 N. W. 192, with an "abstract of the evidence." In *Whalen v. Ruiz* (3d Dist. 1952) 110 A. C. A. 168, 242 P. 2d 78, the appeal was taken upon the bare judgment roll. Appellee, which had been dismissed below upon a ground held erroneous by the appellate court, had been given leave to bring up the evidence, which it contended would have sustained the judgment in its favor upon another ground, and had brought up only a part. This case obviously has no application.

The federal case, *Nolan v. United States* (8 C. A. 1935) 75 F. 2d 65, was decided several years before the Federal Rules of Civil Procedure went into effect.

The spirit of Rule 75 is embodied in subdivision (e): "All matter not essential to the decision of the questions presented by the appeal shall be omitted." The older systems placed the entire responsibility of getting up the record upon the appellant. The appellant still has that

responsibility under Rule 75. Appellant must procure for and include in the record testimony and exhibits that his adversary has designated as well as that which appellant himself has designated. But if appellant specifies his points, he is not obliged to include in the record matter not designated by him which appellee has also not designated. By this method of specification of points and of designation of matters to go in the record by both parties, the object of excluding the nonessential is attained, while making sure that nothing is excluded which bears upon the points specified.

Here, in compliance with the rule, appellant designated its points (337) and designated the contents of the record (338). One of the points designated was:

“That the evidence is insufficient to establish a contract between the parties, written or oral.”

If there were anything in the matter omitted which would have tended to sustain the verdict, appellee had full opportunity to designate it and failed to do so. Even now he does not point out any evidence whatsoever, material or otherwise, in the omitted matter which would sustain his position.

The case is fully covered by the decision of this Court in *Associated Indemnity Corporation v. Manning* (9 C. A. 1939) 107 F. 2d 362, where the Court said, per HEALY, J. (p. 363):

“Appellant contends that these findings are not supported by the evidence. Appellees, while defending the findings, insist that the evidence is not all here, hence the findings are not subject to attack. With respect to the latter proposition, it need only be said that appellant complied with Rule 75 of the Rules of Civil Procedure for the District Courts, 28 U. S. C. A. following section 723c, in effect at the time the appeal was taken. Appellees have not called attention to any material evidence claimed to have been omitted from the record.”

In addition to the question of contract or no contract, the case presented what amounted to an audit of appellee's expense account. The matter omitted consisted of testimony of appellant's comptroller, C. W. Baruth, part of the cross-examination of appellee, and certain exhibits, all dealing with this expense account except Exhibit 3, letter of Western Airlines, dated September 22, 1950, granting appellee 180 days' leave, and Exhibit 4, agreement between Western Airlines and its pilots, effective November 16, 1949, testified to by appellee at record, page 134, matters not in dispute. To avoid all question, appellant has obtained leave to bring up the undesignated portions of the record. Upon inspection, the Court will readily see that there is nothing in them which supports the thesis that appellee concluded a two-year contract with appellant, written or oral.

## II.

**Even assuming an oral agreement, *Seymour v. Oelrichs* may not be applied.**

Appellee's effort to avoid the statute of frauds must rest in the first instance upon the existence of an oral agreement. Indeed, the vague and conclusory testimony of appellee illustrates perfectly the reason for the enactment of the statute of frauds in so many jurisdictions, and its retention as part of the common law where it has not been the subject of specific legislation. See *Holton v. Reed* (10 C. A. 1951) 193 F. 2d 390, 393. The attempt to invoke the doctrine of promissory estoppel must rest on the rather violent assumption that there was a meeting of the minds of Stephenson and Marshall upon the promise alleged.

Appellee's principal reliance is upon the case of *Seymour v. Oelrichs* (1909) 156 Cal. 782, 106 P. 88.

Appellee contends (Brief, p. 29) that "had the facts as presented in the *Seymour* case been decided in the New

York jurisdiction, the decision would be one and the same even though the New York court would in all likelihood \* \* \* have refused to use the label promissory estoppel." The clear implication is that the New York court would have used the label "partial performance", since that is the only ground upon which the New York Court of Appeals has enforced oral contracts within the statute of frauds where the statute has been pleaded as a defense. But appellee is clearly wrong as to the *Seymour* case, for this, like the present case, was a case of a contract not to be performed within the year and, therefore, covered in New York by § 31 of the Personal Property Law. And by a plethora of authority (Main Brief, pp. 21-22) nothing short of full performance by both parties will take such a contract out of the operation of the statute. It is only as to contracts relating to real property (§ 259 of the Real Property Law) that partial performance will ever result in the enforcement of the oral contract.

The difference between the doctrine of partial performance, as developed under § 259 of the New York Real Property Law, and the doctrine of promissory estoppel, as developed in California and other jurisdictions, is not one of label only. No doubt an oral contract which New York would enforce under its doctrine of partial performance would also be enforced in California under the doctrine of promissory estoppel. That is so because every case of part performance by the promisee involves detriment to the promisee in reliance upon the oral promise. But it does not necessarily follow that an oral promise which would be enforced in the jurisdictions entertaining the doctrine of promissory estoppel would be enforced in New York as partial performance. It is implicit in New York law, as developed by the Court of Appeals, that performance by the promisee which will avoid the statute of frauds must be of a nature itself to evidence the oral contract claimed. As put by CARDOZO, J., in *Burns v. McCormick* (1922) 233 N. Y. 230, 232-3, 135 N. E. 273, a case in which relief was denied:

“What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done. The house-keeper who abandons other prospects of establishment in life and renders service without pay upon the oral promise of her employer to give her a life estate in land, must find her remedy in an action to recover the value of the service (*Maddison v. Alderson*, L. R. 8 App. Cases, 467, 475, 476). Her conduct, separated from the promise, is not significant of ownership either present or prospective (*Maddison v. Alderson*, *supra*, at pp. 478, 481). On the other hand, the buyer who not only pays the price, but possesses and improves his acre, may have relief in equity without producing a conveyance (*Canda v. Totten*, 157 N. Y. 281; *McKinley v. Hessen*, 202 N. Y. 24). His conduct is itself the symptom of a promise that a conveyance will be made. Laxer tests may prevail in other jurisdictions.”

The additional requirement which New York makes over and above a mere showing that the promisee has relied upon the promise to his detriment is emphasized by italics in the following quotation from the opinion of COLLIN, J., in *Woolley v. Stewart* (1918) 222 N. Y. 347, 351, 118 N. E. 847:

“He may, however, withdraw himself from the policy and defense of the statute, or waive its protection, by inducing or permitting without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter his situation and make the interposition of the statute against performance a fraud. In such a case a court of equity acts upon the principle that not to give effect to those acts would be to allow the party permitting them to use the statute as an instrument defending deception and injustice. *The acts must, however, be so clear, certain and definite in their object and design as to refer to a complete and perfect agreement of which they are*



*a part execution—must be unequivocal in their character and must have reference to the carrying out of the agreement. An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not, in general, admitted to constitute a part performance.”*

In the instant case, the acts of appellee which are claimed to establish the basis for the estoppel admit of explanation without reference to the alleged oral contract, for they are equally attributable to a continuation of the hiring at will. Appellee concededly had no contract prior to March 16th (127-128). He had been employed by appellant since the previous September (121) under a contract at will, and had removed his family to Alaska the previous January. Thus, the surrender of the Western Airlines job and his return to Alaska and resumption of his duties there furnishes no “key” as to what the agreement between the parties actually was. And even if it had any evidentiary force, it would be completely rebutted by appellee’s conduct, in his return to New York within a few weeks to press on appellant a proposed written contract wholly different in its terms from that which is now sought to be enforced (137-142).

The case of *Seymour v. Oelrichs*, principally relied upon by the appellee, would not have been decided for the plaintiff in New York for the reasons outlined above. In any event, that case is clearly distinguishable on its facts from the instant case. In *Seymour v. Oelrichs* the plaintiff had not been previously employed under a hiring at will.

Appellee endeavors to whittle down the strictness of the New York rule by reference to *M. H. Metal Products Corporation v. April* (1929) 251 N. Y. 146, 150, 167 N. E. 201, and to three decisions of the lower courts. The Court of Appeals case lends no support to appellee’s position. Defendant guarantor, by reason of his conduct, was

estopped to assert the defense that an oral modification increasing the contract price had discharged him from his guaranty. But he was held liable only to the extent of his actual written guaranty.

In *Gorman v. Fried* (App. T., 2d Dept. 1942) 35 N. Y. Supp. 2d 441, defendant was held liable, despite the statute of frauds, to pay the installments due on the purchase of an automobile. But plaintiff had fully performed; defendant had the automobile.

In the *nisi prius* case of *In re Melia's Estate* (Sur. Ct., Westchester Co. 1950) 98 N. Y. Supp. 2d 941, the discovery proceeding was held to be in the nature of an accounting of a joint venture. It is not clear how the statute of frauds applied.

Appellee has missed the significant point in the *nisi prius* case of *Weiss v. Weiss* (Kings, Trial T., 1944) 49 N. Y. Supp. 2d 128. Plaintiff was induced to abandon an attempted reorganization of his laundry corporation under the Bankruptcy Act and to permit it to be adjudicated a bankrupt upon the promise by his two daughters and their husbands that they would acquire the assets at the bankruptcy sale, would carry on the business, and pay plaintiff \$50 a week for the rest of his life. The agreement to pay the \$50, though oral, was enforced by the Court in view of the fact that one son-in-law was plaintiff's attorney and the additional fact that he and the other son-in-law and his wife had concealed from plaintiff the fact that they had already acquired two mortgages which were a first lien upon the property, one of which was held by the Reconstruction Finance Corporation. The Court was thus moved by the existence of the fiduciary relationship and the concealment of the material fact that the mortgages were now in family hands. Rose Weiss, the wife of the attorney Martin, had not acquired any interest in the two mortgages nor had she concealed the fact of the acquisition of the mortgages from her father. The significant thing about this decision is the following (p. 134):

“Defendant Rose Weiss (Martin’s wife) urged plaintiff to accept the retirement offer. She agreed to perform her part of the contract. She defaulted. But she urges the statute of frauds as a defense. There is nothing in the evidence which embarrasses her in this respect. As to her, the statute is operative. The defense is good.”

If the doctrine of promissory estoppel had been admitted, clearly the defense of Rose Weiss was no better than that of the others against whom estoppel *in pais* was enforced, since plaintiff had abandoned his reorganization plans in reliance upon her promise as well as that of the others.

The Per Curiam decision of this Court in *Union Packing Co. v. Cariboo Land & Cattle Co.* (9 C. A. 1951) 191 F. 2d 814, does no more than to hold that *Seymour v. Oelrichs* is the law of California. It is not the law of California, but the *lex loci contractus* which is decisive in the present instance. The obligation of the contract must be determined by the law of New York.

It would be absurd to suppose that the New York Court of Appeals would carefully insist, as it so often has, that the acts on the part of the promisee, which will take a case out of the statute of frauds found in § 259 of the Real Property Law, must be unequivocally referable to the contract, and then waive that requirement with respect to § 31 of the Personal Property Law as to which it has never been willing to admit the doctrine of partial performance at all.

### III.

#### **New York Law Applies.**

Comment “b” of § 334 of the Restatement of Conflict of Laws, so far as material, is as follows:

“The requirements of writing may be a requirement of procedure or a requirement of validity, or

both. If, for instance, the statute of frauds of the place of contracting is interpreted as meaning that no evidence of an oral contract will be received by the court, it is a procedural statute, and inapplicable in the courts of any other state (see § 598). If, however, the statute of frauds of the place of contracting is interpreted as making satisfaction of the statute essential to the binding character of the promise, no action can be maintained on an oral promise there made in that or any state; and if the statute of frauds of the place of contracting makes an oral promise voidable, and the promisor avoids such a promise, the same result follows. \* \* \*”

There is no reason to suppose that the Conflicts Law of Alaska is different. Appellee apparently accepts the Restatement on this point (Brief, pp. 31-32).

It is agreed (Appellee's Brief, p. 30) that textually the Alaska and New York statutes relating to agreements not to be performed within the year are substantially identical. Appellant contends that despite the fact that both make the unwritten agreement “void”, they are both procedural statutes. Hence, appellee argues (Brief, p. 31) that appellee “must only establish that the doctrine of estoppel is recognized in the jurisdiction of Alaska since the law of the forum controls the matter of evidence.”

Appellee's argument that the Alaska statute is procedural appears to be based entirely on the fact that the section in question (§ 58-2-2) is grouped with other sections under a chapter headed “Indispensable Evidence”. But a title, though it should not be entirely ignored, is “of little weight”. *Goodlett v. Louisville Railroad* (1887) 122 U. S. 391, 408. See also *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co.* (1947) 331 U. S. 519, 528. Especially must this be so where the title was not affixed by the legislature when the statute was originally enacted, but merely appears in a subsequent codification.

There is no discussion of the doctrine of promissory estoppel in *Rassmus v. Carey* (D. C. Alaska, 1947) 11

Alaska 456. Assuming, however, as appellee does, that *Rasmus v. Carey*, is to be regarded as adopting the theory of promissory estoppel for Alaska, and further assuming that the Alaska statute is procedural, the only result of appellee's argument is that his recovery is not barred by the Alaska statute. This leaves entirely open the question whether recovery is barred by the New York statute.

If the New York statute is substantive and not procedural then, under the Restatement to which appellee subscribes, the contract in suit cannot be enforced in Alaska if appellant might have avoided its performance in New York. Indeed, as pointed out in a Note, 47 *Harvard Law Review* 320:

“\* \* \* if a contract fails to satisfy the statutory requirements of the *locus* it establishes no perfected obligations there, and enforcement by the forum would in reality be a *de novo* creation of rights.”

Whatever may be said as to the Alaska statute, the conclusion is inevitable that the New York statute is substantive. It must be agreed that appellee does find some support for his position in the language of *Wikiosco, Inc. v. Proller* (3d Dept. 1949) 276 N. Y. App. Div. 239, 94 N. Y. Supp. 2d 645 dealing with the Real Property Section and not with Section 31. However, the New York cases cited in this intermediate appellate decision are either those in which recovery was permitted upon the theory of partial performance, those which relate to the sufficiency of the writing or those in which plaintiff was allowed a recovery because defendant failed to plead the statute of frauds. The legal basis of this last proposition, well settled in New York law, however, is not that the statute is procedural or evidential, but that its effect is to make the unwritten contract voidable at the option of the promisor. The matter is thus explained in *Matthews v. Matthews* (1897) 154 N. Y. 288, 48 N. E. 531, where the Court said, per ANDREWS, Ch. J. (pp. 291-292):

“It is plain, upon the view that the Statute of Frauds does not make an oral contract within its terms illegal, but only voidable at the election of the party sought to be charged, that such election must be manifested in some affirmative way. The mere denial in the answer of the contract alleged in the complaint, when the character of the contract is not disclosed, is quite consistent with an intention to put in issue simply the fact whether any agreement was entered into, either oral or written. One of the rules established by the English Judicature Act, as amended in 1873 (38 & 39 Vict., ch. 77, rule 19), ordained that, ‘where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise,’ and in *Towle v. Topham* (37 L. T. [N. S.] 309), Jessel, M. R., applied the rule to the pleadings in an equity case.”

Nothing could be clearer than that the right of the promisor to elect whether or not to treat his oral promise as binding is a substantive right.\* And thus the New York statute of frauds clearly comes squarely within the language of the Restatement Comment quoted above:

“\* \* \* and if the statute of frauds of the place of contracting makes an oral promise voidable, and the promisor avoids such a promise, the same result [i.e., no action maintainable in any state] follows.”

A square holding on the precise question involved herein was handed down in the recent New York case of *Silverman v. Indevco, Inc.* (N. Y. Sp. T. 1951) 106 N. Y. S. 2d 669. In that case an oral employment agreement for a period of two years made in Pennsylvania would have been valid under Pennsylvania law, but it was contended that no re-

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\* A bill in the 1953 Legislature (G. O. 120, Nos. 142, 2947, Int. 142) which would have substituted for the words “is void” in § 31 the words “shall not be enforceable by action” was vetoed by the Governor.

covery might be had in New York because the New York statute was procedural. The Court said (pp. 670-671):

“The application of section 31 to the contract in question would seem to depend upon whether it is substantive or procedural in content. It is fairly clear that if section 31 has to do with the validity of the contract then *lex loci contractus* applies, and if it relates to its enforcement or procedure incident thereto, *lex loci forum* governs. *Russell v. Societe Anonyme Des Etablissements Aeroxon*, 268 N. Y. 173, 197 N. E. 185; *Bitterman v. Schulman*, *supra*; *Regan v. Nelden*, 178 Misc. 86, 33 N. Y. S. 2d 133.

“Section 31 makes void any agreement not to be performed within one year from the making thereof. In the opinion of the court the section relates to validity and, therefore has no application to the contract at bar, which so far as appears on this application, as to its validity is governed by *lex loci contractus*.”

This decision was affirmed without opinion, 279 App. Div. 573, 107 N. Y. S. 2d 542.

Since the New York statute is substantive, and since New York would not employ the doctrine of promissory estoppel to defeat the application of the statute (even assuming that a case for promissory estoppel has been made, which it has not), the instant contract must be held unenforceable under the statute of frauds.

Dated: Anchorage, Alaska, May 15, 1953.

Respectfully submitted,

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